No. 17-773	
Title:	**Richard Allen Culbertson, Petitioner** **v.** **Nancy A. Berryhill, Acting Commissioner of Social Security**
Docketed:	November 27, 2017
Linked with 17A279	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-14004)
Decision Date:	June 26, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 05 2017	Application (17A279) to extend the time to file a petition for a writ of certiorari from September 24, 2017 to November 23, 2017, submitted to Justice Thomas.
Sep 15 2017	Application (17A279) granted by Justice Thomas extending the time to file until November 23, 2017.
Nov 21 2017	Pursuant to Rule 34.6 and Paragraph 9 of the Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, filings in this case should be submitted in paper form only, and should not be submitted through the Court's electronic filing system.
Nov 21 2017	Petition for a writ of certiorari filed. (Response due December 27, 2017) **Petition** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	Motion to extend the time to file a response from December 27, 2017 to January 26, 2018, submitted to The Clerk.
Dec 21 2017	Motion to extend the time to file a response is granted and the time is extended to and including January 26, 2018
Jan 25 2018	Motion to extend the time to file a response is granted and the time is further extended to and including March 8, 2018.
Jan 25 2018	Motion to extend the time to file a response from January 26, 2018 to March 8, 2018, submitted to The Clerk.

Mar 05 2018	Motion to extend the time to file a response from March 8, 2018 to March 22, 2018, submitted to The Clerk.
Mar 06 2018	Motion to extend the time to file a response is granted and the time is further extended to and including March 22, 2018.
Mar 20 2018	Motion to extend the time to file a response from March 22, 2018 to April 5, 2018, submitted to The Clerk.
Mar 21 2018	Motion to extend the time to file a response is granted and the time is extended to and including April 5, 2018.
Apr 03 2018	Letter of March 30, 2018, received from counsel for the petitioner. **Main Document**
Apr 05 2018	Brief of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration filed. **Main Document**
Apr 13 2018	Letter waiving the 14-day waiting period for the filing of a reply pursuant to Rule 15.5 received. **Main Document**
Apr 18 2018	DISTRIBUTED for Conference of 5/10/2018.
May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 21 2018	Petition GRANTED.
May 21 2018	As Rule 34.6 provides, "If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to [applicable] redaction rules." Subsequent party and amicus filings in the case should now be submitted through the Court's electronic filing system, with any necessary redactions.
May 24 2018	Blanket Consent filed by Petitioner, Richard Culbertson. **Blanket Consent**
May 25 2018	Amy Weil, Esquire, of Atlanta, Georgia, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Jul 03 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix, petitioner's brief on the merits, and respondent's brief in support is extended to and including July 16, 2018. The time to file the brief of

	Court-appointed amicus curiae in support of the judgment below is extended to and including September 7, 2018.
Jul 03 2018	Any amicus briefs in support of the judgment below are due within 7 days after the filing of the brief of Court-appointed amicus curiae in support of the judgment below.
Jul 03 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jul 16 2018	Joint appendix filed. **Main Document** **Proof of Service**
Jul 16 2018	Brief of petitioner Richard Culbertson filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration in support of reversal and remand filed. **Proof of Service** **Main Document**
Jul 23 2018	Amicus brief of National Organization of Social Security Claimants' Representatives not accepted for filing. (July 25, 2018) - To be resubmitted with required documents.)
Jul 23 2018	Brief amicus curiae of National Organization of Social Security Claimants' Representatives in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 13 2018	Motion for divided argument filed by respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration. **Proof of Service** **Main Document**
Aug 20 2018	SET FOR ARGUMENT on Wednesday, November 7, 2018
Sep 06 2018	Brief of Court-appointed amicus curiae in support of the judgment below filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 06 2018	Lodging proposal of Court-appointed amicus curiae filed. (Distributed) **Main Document**
Sep 10 2018	Record requested from the U.S.C.A. 11th Circuit.
Sep 12 2018	CIRCULATED
Oct 01 2018	Motion for divided argument filed by respondent GRANTED.

Oct 09 2018	Reply of petitioner Richard Culbertson filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Reply of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration filed. (Distributed) **Proof of Service** **Main Document**
Oct 24 2018	Lodging proposal of respondent filed. (Distributed) **Main Document**
Nov 07 2018	Argued. For petitioner: Daniel R. Ortiz, Charlottesville, Va. For respondent in support of reversal and remand: Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For amicus curiae in support of judgment below: Amy L. Weil, Atlanta, Ga. (Appointed by this Court.)
Nov 15 2018	Record received from the U.S.C.A. 11th Circuit and the U.S.D.C. Middle district of Florida, is complete and electronic.
Jan 08 2019	Judgment REVERSED and case REMANDED. Thomas, J., delivered the **opinion** for a unanimous Court.

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No.

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"Fees for [the] representation of individuals claiming Social Security old-age, survivor, or disability benefits [at] the administrative and judicial review stages [are handled] discretely: [42 U.S.C.] § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002). Section 406(b) specifies in particular that

> [w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee *for such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A) (emphasis added).

The question presented is:

Whether fees subject to § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to Richard A. Culbertson and the then-Commissioner of Social Security, Celalettin Akarcay, Darleen R. Schuster, Bill J. Westfall, and Katrina F. Wood were parties in the consolidated proceeding in the court of appeals. Among the non-governmental parties, Richard A. Culbertson is the real party in interest. App., *infra*, 3a, n.1. Since the petition concerns fee awards related to the representation of only Bill J. Westfall and Katrina F. Wood, petitioner believes that Celalettin Akarcay and Darleen R. Schuster have no interest in the outcome of the petition. See Rule 12.6.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 861 F.3d 1197. The district court's orders of April 20, 2016, on Plaintiff's Amended Consent Motion For Attorney's Fees (App., *infra*, 18a-29a), of November 17, 2015, on Plaintiff's Unopposed Request For Authorization To Charge A Reasonable Fee Under 42 U.S.C. 406(b) (App. *infra*, 30a-35a), and of April 19, 2015, on Defendant's Motion For Relief From Order Pursuant To Rule 60 (App., *infra*, 36a-57a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari until November 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent parts of the relevant statutory provisions, 42 U.S.C. § 406(a)-(b), appear in the appendix. App., *infra*, 58a-64a.

STATEMENT

A. Statutory Background

Title II of the Social Security Act, 42 U.S.C. § 401 et seq., governs the award and collection of fees by

attorneys representing claimants seeking old-age, survivor, or disability insurance benefits. Section 406(a) governs the award and collection of attorney's fees for representing Social Security claimants before the agency. Section 406(b), by contrast, governs the award and collection of fees by attorneys for representing claimants in court.

Section 406(a) provides two ways for an attorney to obtain fees for work before the agency: the "fee petition process" and the "fee agreement process." The "fee petition process" is governed by § 406(a)(1). When the agency acts favorably to the claimant, § 406(a)(1) authorizes the Administration to "fix * * * a reasonable fee to compensate [the] attorney for the services performed by him in connection with such claim." 42 U.S.C. § 406(a)(1). Section 406(a)(1) requires that any such award be "reasonable" but does not otherwise limit it. And the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2).

The "fee agreement process" is governed by § 406(a)(2). Under it, the attorney and the claimant enter into a written fee agreement and submit it to the agency before it determines the claimant's benefits. 42 U.S.C. § 406(a)(2)(A). If the agency acts favorably to the claimant, it "shall approve" the fee agreement at the time of the determination, provided the fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009).

Section 406(b), by contrast, governs the fees an attorney may charge a claimant for representation *in court*. It states that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). The particular question concerns whether § 406(b)'s allowance of "reasonable fee[s] for *such representation*," *ibid.* (emphasis added), includes representation before the agency or only before the court.

B. Procedural Background

1. In 2008, Katrina F. Wood, represented by Richard A. Culbertson, filed for Social Security disability benefits but was determined by the Administrative Law Judge (ALJ) not to be disabled. App., infra, 28a. After the Appeals Council denied review, Wood sought review in the district court, which reversed and remanded the agency's decision. *Ibid.* The court also awarded Wood $4,107.27 in attorney's fees under the Equal Access to Justice Act (EAJA). App., *infra*, 22a. At that point, Wood and Culbertson entered into a fee agreement providing for attorney's fees for future work in the amount of 25 percent of any past-due benefits minus attorney fees paid under the EAJA. App., *infra*, 19a, 22a. On reconsideration, the agency awarded Wood past-due benefits of $35,211 for

herself and a child beneficiary, App., *infra*, 27a, and, pursuant to § 406(a), awarded Culbertson $2,865 in attorney's fees for representing her before the agency, App., *infra*, 5a, 22a, which would come out of her awarded past-due benefits, App., *infra*, 19a.

Wood then asked the district court to authorize a payment of $4,488.48 in attorney's fees to Culbertson under § 406(b) for his work reversing the agency's initial decision in court. App., *infra*, 19a. The request followed the terms of the fee agreement and represented 25 percent of the past-due benefits that Wood had collected ($8,595.75) minus the fees already awarded under the EAJA ($4,107.27). App., *infra*, 19a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see App., *infra*, 20a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing *Paltan* v. *Commissioner of Social Security*, 518 F. App'x 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Social Security*, 490 F. App'x 314 (11th Cir. 2012) as persuasive authority), the district court held, however, that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), App., *infra*, 26a. It thus declined to award Culbertson for his work in court 25 percent of the past-due benefits minus the EAJA award, as the fee agreement provided. *Ibid.* The district court instead awarded only $1,623.48, which represented 25 percent of the past-due benefits minus *both* the EAJA award and the § 406(a) fees awarded by the Commissioner. App., *infra*, 26a.

2. Culbertson also successfully represented claimant Bill Westfall before the agency and district court. App., *infra*, 6a, 33a. After the agency denied Westfall disability benefits, the district court reversed and remanded and awarded Westfall $2,713.30 under the EAJA. App., *infra*, 6a. On remand, the agency awarded Westfall past-due benefits of $24,157. *Ibid.* Based on a contingency-fee agreement with Westfall, App., *infra*, 31a, Culbertson asked the district court for $3,325.95 in attorney's fees for representation in court under § 406(b), which represented 25 percent of past-due benefits awarded ($6,039.25) less the EAJA award ($2,713.30), App., *infra*, 6a-7a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see App., *infra*, 32a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing *Paltan* v. *Commissioner of Soc. Sec.*, 518 F. App'x 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012) as persuasive authority), the district court held that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), *ibid.* Since the agency had not yet determined allowable § 406(a) fees, the district court allowed Culbertson's full § 406(b) request for $3,325.95 but barred him from requesting further fees under § 406(a) or otherwise. App., *infra*, 7a.

3. On consolidated appeal, the Eleventh Circuit affirmed the district court's orders. App., *infra*, 17a. It first rejected the claimants' argument that *Dawson*, the controlling Fifth Circuit precedent adopted by the Eleventh Circuit, see App., *infra*, 11a, limited only the

amount the agency could itself *pay out* from past-due benefits, not the amount the district court could *authorize* for payment, App., *infra*, 13a. Next it acknowledged that three other circuits "do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406." *Ibid.* Although that was "[t]rue," the court argued (1) that all those cases "explicitly or implicitly recognize that Dawson[, the controlling Fifth Circuit precedent, did] limit[] the combined § 406(a) and (b) attorney's fees awards to 25% of past-due benefits," *ibid.*, (2) that "[t]he Fifth Circuit continues to read Dawson to limit the aggregate award" and (3) that "the Fourth Circuit [has] relied on Dawson to support its holding that § 406(b) limits the combined § 406 award to 25% of past-due benefits." App., *infra*, 14a, n.5 (citations omitted). "To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided," it noted, "this does not empower us to ignore it." App., *infra*, 14a. "We are," it continued, "bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Acknowledged Conflict Among The Courts Of Appeals Over Whether Section 406(b)'s 25-Percent Cap On Attorney's Fees Applies Only To Fees Awarded Under Section 406(b) Or To The Combined Total Fees Awarded Under Sections 406(a) And 406(b)

In reaching its decision below, the Eleventh Circuit noted that "some other circuits" disagreed with it and "do not apply the 25% limit in § 406(b) to the aggregate

fee award under § 406." App., *infra*, 13a. The Fifth Circuit has also recognized "sharp disagreement from other courts of appeals" over how § 406(b)'s 25-percent cap applies, *Rice* v. *Astrue*, 609 F.3d 831, 835 (5th Cir. 2010), and several other courts of appeals have acknowledged the split as well, *Booth* v. *Commissioner of Soc. Sec.*, 645 F. App'x 455, 457 (6th Cir. 2016) (acknowledging the split with a "*But see*" signal); *Murkeldove* v. *Astrue*, 635 F.3d 784, 788 n.1 (5th Cir. 2011) ("There is currently a Circuit split on the issue."); *Clark* v. *Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008) (noting that "[o]ther circuits that have addressed this issue have reached different results" and characterizing the split as one between a "plain text" approach and an approach "[b]ased primarily on legislative history").

Practice guides to Social Security law also have acknowledged the split. See Robert E. Jones et al., *Rutter Group Practice Guide: Federal Civil Trials and Evidence* § 19:335.1 (Westlaw, current through June 2017) (discussing the split); Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability Law and Procedure in Federal Court* § 10:8 (Westlaw, current through Feb. 2017) (same); 1 Robert L. Rossi, *Attorneys' Fees* § 10:66 (3d ed. 2017) (Westlaw, current through June 2017) (same); 5 *West's Federal Administrative Practice* § 6277 (Westlaw, current through June 2017) (same). Indeed, even the Commissioner of Social Security has acknowledged the circuit split:

> This Court[, the Fifth Circuit,] has held that § 406 limits the combined amount of attorney's fees that may be awarded the attorney under § 406(a)

> and § 406(b) to a total of 25 percent of any past-due benefits awarded to the claimant. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.), *cert. denied*, 400 U.S. 830 (1970). *Accord Morris v. SSA*, 689 F.2d 495, 497-98 (4th Cir. 1982). But see *Clark v. Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008) ("§ 406(b)'s cap on attorney's fees applies only to fees awarded under § 406(b), and does not limit the combined fees awarded under both § 406(a) and § 406(b)"); *Wrenn v. Astrue*, 525 F.3d 931, 936 (10th Cir. 2008) (same), and *Horenstein v. Secretary of HHS*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc) (same).

Gov't C.A. Br. at 5 n.2, *Jackson* v. *Astrue*, 705 F.3d 527 (5th Cir. 2013) (No. 12-10255); see also Gov't C.A. Br. at 7 & n.3, *Murkeldove* v. *Astrue*, 635 F.3d 784 (5th Cir. 2011) (Nos. 09-11093 & 09-10902) (similarly summarizing the split).

Where, as here, there is "sharp disagreement" among the circuits, *Rice*, 609 F.3d at 835, only this Court's review can bring uniformity to the law and settle this pressing and practically important issue.

A. Three Federal Circuits Hold That Section 406's Legislative History Requires The Total Fees Awarded Under Sections 406(a) And 406(b) To Be Capped At 25 Percent Of Past-Due Benefits

The Fourth, Fifth, and Eleventh Circuits have held that 42 U.S.C. § 406(b) "precludes the aggregate allowance of attorney's fees greater than 25 percent of the past due benefits received by the claimant" without regard to whether those fees were authorized

under § 406(a) for representation before the agency or under § 406(b) for representation in court. *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970); see also App., *infra*, 11a-12a (interpreting *Dawson* as holding that "the 25% limit from § 406(b) applies to total fees awarded under both § 406(a) and (b)"); *Morris* v. *Social Sec. Admin.*, 689 F.2d 495, 496 (4th Cir. 1982) (per curiam) (affirming district court's ruling that § 406 "limits the aggregate attorney's fees recoverable to 25 percent of the claimant's past-due benefits").

These courts have followed a particular reading of the statute's legislative history to reach this result. *Morris*, 689 F.2d at 497; *Dawson*, 425 F.2d at 1194-1195. They all have focused on the Department of Health, Education, and Welfare's (HEW) statements in 1965 to the Senate Finance Committee about why the 25-percent cap to § 406(b) should be added. *Morris*, 689 F.2d at 497; *Dawson*, 425 F.2d at 1194-1195. These courts place particular weight on the Department's statement that amending § 406(b) was "designed to alleviate two problems." *Dawson*, 425 F.2d at 1194 (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965)). According to HEW, the amendment would first "encourage effective legal representation of claimants [by allowing] the court-approved fee to the attorney [to be paid directly by the agency] out of the amount of accrued benefits." *Ibid.* (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965)). Second, the amendment's 25-percent cap would address concerns "that attorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in Federal

district court actions arising under the social security program." *Ibid.* (quoting *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965))

The Fourth Circuit focused further on a Senate report that used language virtually identical to HEW's second statement. *Morris*, 689 F.2d at 497 (ignoring HEW's first statement that § 406(b) was intended to "encourage effective legal representation of claimants," but using both the report and HEW's second statement to identify "inordinately large fees * * * as the impetus for the amendment") (quoting S. Rep. No. 89-404, at 122 (1965)). To these courts, this legislative history indicated a congressional intent "to insure [sic] that the old age benefits for retirees and disability benefits for the disabled, which are usually the claimant's sole means of support, are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received." *Dawson*, 425 F.2d at 1194-1195; see also *Morris*, 689 F.2d at 497 (discussing the Senate report and concluding that "the legislative history of section 406 convinces us that the court must take into account any fees fixed by the Secretary pursuant to subsection (a)"). Based on these concerns, these courts held that "fees under § 406(a) [awarded at the administrative level] plus fees under § 406(b) [awarded at the district-court level] cannot exceed 25% [of the claimant's past-due benefits]." *Rice*, 609 F.3d at 835.

The Fourth Circuit relied further on the 1965 amendment's legislative history to interpret a later 1968 amendment to § 406(a), which it thought supported aggregating § 406(a) and § 406(b) awards

under § 406(b)'s cap. *Morris*, 689 F.2d at 497-498. The court explained that after the 1968 amendment to § 406(a), which limited attorney's fees for representation before the agency to 25 percent of past-due benefits, "neither the Secretary nor the district court was authorized to approve an attorney's fee in excess of 25 percent of the successful claimant's past-due benefits." *Id.* at 497. Since "Congress," it believed, "did not want the amount of an attorney's fees to turn on the forum in which a claim was decided," the Fourth Circuit inferred "that the same desire to eliminate 'inordinately large fees[]' * * * that prompted Congress to adopt the 1965 amendment * * * also inspire[d] the passage of the parallel 1968 amendment." *Id.* at 497-498. From this, the court concluded, the 25-percent cap had to apply to the total of § 406(a) and § 406(b) awards. Otherwise, "an attorney [could] recover fifty percent of his client's accrued benefits in direct contravention of congressional attempts to foreclose contingent fee arrangements of one-third to one-half." *Id.* at 498.

B. Three Other Federal Circuits Hold That Section 406's Plain Language, Structure, And Legislative History All Require That Section 406(b)'s 25-Percent Cap Apply Only To Fees Awarded For Work Before The Court

The Sixth, Ninth, and Tenth Circuits have interpreted § 406(b) as limiting "only the amount of attorney's fees awarded under § 406(b), not the combined fees awarded under § 406(a) and § 406(b), to 25% of the claimant's past-due benefits." *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008); see also

Wrenn v. *Astrue*, 525 F.3d 931, 937 (10th Cir. 2008) ("Based on the plain language and statutory structure found in § 406, the 25% limitation on fees for court representation found in § 406(b) is not itself limited by the amount of fees awarded by the Commissioner"); *Horenstein* v. *Secretary of Health & Human Servs.*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc) (overruling prior circuit precedent and holding that § 406(b)'s 25-percent cap applies only "[f]or services performed in a federal court where the court awards benefits").

The primary rationale embraced by these courts, as expressed by Judge Bea writing for the Ninth Circuit in *Clark* v. *Astrue*, is that "the plain text of § 406(b) limits only the award of attorney's fees for representation of a Social Security claimant before the district court." 529 F.3d at 1215; see also *Wrenn*, 525 F.3d at 937 ("[b]as[ing holding] on the plain language and statutory structure found in § 406"); *Horenstein*, 35 F.3d at 262 (overruling precedent that had imposed a "blanket 25 percent cap on fee awards" because that holding "f[ound] little support in the language of the statute").

That "plain text" instructs that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). These courts have reasoned that "[t]he statute authorizes the court to award a reasonable fee 'for such representation'" and that "such representation" can refer only to "representation 'before the court,'" *Clark*, 529 F.3d at 1215 (quoting § 406(b)), the only type of representation referenced by § 406(b) itself.

Some of these courts have also held that § 406's structure points to the same conclusion. The Tenth Circuit, for example, has noted that "[s]ection 406 'deals with the administrative and judicial review stages discretely: § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court.'" *Wrenn*, 525 F.3d at 932 (quoting *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002)); see also *Clark*, 529 F.3d at 1214 (describing § 406(a) as "govern[ing] the award and collection of attorney's fees for the representation of Social Security claimants in proceedings before the Administration" and § 406(b) as "govern[ing] the award and collection of fees by attorneys for the representation of claimants in court"). The Ninth Circuit has likewise pointed out that § 406(a)(1) gives the agency the power to award attorney's fees that are "reasonable" at the administrative level—without imposing a 25-percent limit—in the event that there is no contingency agreement between a claimant and an attorney who represented the claimant during the administrative proceedings. *Id.* at 1216 (quoting 42 U.S.C. § 406(a)(1)). "If a fee award under § 406(a) can be greater than 25% of past-due benefits," the court explained, "it follows that the combined amount of fees

awarded under both § 406(a) and § 406(b) must be capable of exceeding 25% of past-due benefits." *Ibid.*

Finally, the Ninth Circuit "f[ou]nd unconvincing the legislative history upon which the Fourth and Fifth Circuits relied in holding § 406(b) limits the combined total of attorney's fees awarded under both § 406(a) and § 406(b) to 25% of past-due benefits." *Clark*, 529 F.3d at 1216. The Ninth Circuit noted that the testimony referenced by the Fifth Circuit demonstrated a concern only about "inordinately large fees for representation 'of claimants *in Federal district court actions*.'" *Id.* at 1216-1217 (quoting *Dawson*, 425 F.2d at 1194). "Nowhere," it explained, "did Congress (or even a congressional committee) express a desire to limit the aggregate fees awarded both for representation of a claimant in court *and* for representation of the claimant before the Administration." *Ibid.* Next, the Ninth Circuit pointed out that the Fourth Circuit in *Morris* had incorrectly interpreted the 1968 amendment to § 406(a) that it had further relied on. *Id.* at 1217. That amendment, the Ninth Circuit noted, "did not prohibit the [agency] from authorizing attorney's fees under § 406(a) in excess of 25 percent of past-due benefits." *Ibid.* To the contrary, the amendment allowed the agency to authorize any "reasonable" fee and "left untouched the [agency's] authority to award attorney's fees under § 406(a)(1) in excess of 25% of past-due benefits." *Id.* at 1218. This fact persuaded the court that "[t]he correct interpretation of the 1968 amendment [not only] does not support the Fourth Circuit's holding in Morris[,] it instead supports the holding we make today." *Ibid.* "[I]f a fee award under § 406(a) can be

greater than 25% of past-due benefits," the court repeated, "it follows that the combined amount of fees awarded under both § 406(a) and § 406(b) must be capable of exceeding 25% of past-due benefits." *Ibid.*

* * *

As matters now stand, attorney's fees awards under § 406 are adjudicated under materially different standards in different circuits. This disuniformity affects attorneys' willingness to represent claimants and ultimately the claimants' ability to receive past benefits due them.

II. The Fourth, Fifth, And Eleventh Circuits Misinterpret The Statute's Plain Language, Structure, Purpose, And History

A. The Plain Language Of Section 406(b) Makes Clear That A Court Should Not Consider Fees Awarded Under Section 406(a) As Subject To Section 406(b)'s 25-Percent Cap

This Court has long held that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

The language of 42 U.S.C. § 406(b) is plain. In relevant part, the statute provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its

> judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

Section 406(b)'s fee authorization "for such representation" refers to representation "before the court"—the only type of representation mentioned to which the term "such representation" could refer. In no way can it include fees for representation before the agency. Reading in a limitation of 25 percent for the total of fees awarded under subsections (a) and (b) therefore violates the "cardinal canon" of construction that a court is to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Unlike subsection (b), subsection (a) of section 406 does refer to fees provided for representation "before the Commissioner for benefits." 42 U.S.C. § 406(a)(1). Reading an aggregate limitation into § 406(b) therefore also runs counter to the principle of *expressio unius est exclusio alterius*, the notion that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015). Because Congress used the "particular language" of "before the court" in regard to fees awarded under subsection (b) and did not include the "particular language" of "before the Commissioner," it intended for § 406(b)'s cap to extend no further than to awards under § 406(b) itself.

When the words of a statute are unambiguous, as they are in § 406(b), the "judicial inquiry is complete."

Connecticut Nat'l Bank, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court thus need not consult either the statutory structure, the congressional purpose, or the legislative history, but, in fact, all three point in the same direction as the plain language.

B. Section 406's Structure Creates Distinct Avenues For Obtaining Fees For Administrative And Judicial Representation

The statutory structure confirms what the plain language makes clear—Congress created two distinct and independent award mechanisms in subsections (a) and (b). Section 406(a) itself provides two ways for an attorney to seek fees for representing a claimant in administrative proceedings: the fee-petition process and the fee-agreement process. Under the former, the agency authorizes a "reasonable fee" to be paid to the claimant's representative.[1] 42 U.S.C. § 406(a)(1). Under the latter, any fee set by agreement between the attorney and the claimant controls so long as it does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in

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[1] The agency has given this reasonableness inquiry real teeth. In determining whether a fee request is reasonable, it must consider "[t]he extent and type of services the representative performed;" "[t]he complexity of the case;" "[t]he level of skill and competence required of the representative[;]" the time the representative spent on the matter; the success of the representation; and the amount of the fee petition. 20 C.F.R. § 404.1725(b). The agency also allows both the claimant and the attorney to seek administrative review of fees authorized under the petition process. *Id.* § 404.1720(d).

the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009).

Section 406(b), on the other hand, governs awards for attorneys representing claimants before a district court. 42 U.S.C. § 406(b). Given that section 406(a) sets forth two separate avenues for determining attorney's fees for representation before the agency, it would not make sense to interpret section 406(b) to regulate awards for representation there. There is simply no need for section 406(b) to regulate awards already deemed "reasonable" under section 406(a) either by the agency itself or because they fall within the safe harbor set by Congress. Section 406(a)'s two attorney's fee provisions effectively check excessive fees for representation before the agency. Checking them again under a provision designed to check fees for representation in court represents an insidious form of double-counting.

As the Ninth Circuit has pointed out, moreover, the petition process does not cap the reasonable fees the agency can award through the petition process. *Clark*, 529 F.3d at 1218. Because § 406(a)(1) authorizes the agency to award reasonable fees above 25 percent of past-due benefits, it makes no sense for § 406(b) to include such fees under its own 25-percent cap. In many cases, that would mean that fees authorized as "reasonable" under § 406(a)(1) would be effectively unreasonable under § 406(b).

Section 406(b), on the other hand, is addressed to different proceedings—those before a district court. In enacting § 406(b), Congress was similarly concerned about excessive fee requests and so it placed a separate check on attorney's fees earned there that is analogous

to § 406(a)(2)'s 25-percent safe harbor. Congress structured the statute to separate fee determinations by forum for a reason: claimants may use different representatives before the agency and district court. Even a non-lawyer, for example, can represent—and receive fees for representing—a claimant before the agency. See Office of the Inspector General, Soc. Sec. Admin., *Informational Report: Agency Payments to Claimant Representatives*, No. A-05-15-15017, at 1 (2015), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-15-15017.pdf (last visited Nov. 10, 2017) ("A claimant may appoint a qualified individual to act on his/her behalf in matters before the Social Security Administration."). Only attorneys, by contrast, can represent claimants in court and be awarded fees for doing so. Soc. Sec. Admin., *Program Operations Manual System* GN 03920.017 § D.5, n.2, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017#d (last visited Nov. 10, 2017) ("In court cases, the law does not provide for direct payment to a non-attorney."). The Social Security Administration recognizes that representation may change between agency and court proceedings. See *id.* GN 03920.060 § A.5, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920060 ("The attorney(s) for the court proceedings may differ from the representative(s) for the SSA administrative proceedings.").

C. Applying A Cap Of 25 Percent Under Section 406(b) For Work Done Before Both The Agency And The District Court Undermines Congress's Purpose

Though the Court need not consider Congress's purpose when a statute's terms, like § 406(b)'s, are unambiguous, *Connecticut Nat'l Bank*, 503 U.S. at 254, Congress's purpose in enacting § 406(b) further supports what the plain text makes clear: the fee awarded to an attorney under § 406(b) is independent of any fee awarded under § 406(a).

Congress added subsection (b) to § 406 to "encourage effective legal representation of claimants." *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965). Interpreting its 25-percent cap as an aggregate limit on awards issued under both § 406(a) and § 406(b) undermines this purpose.

Subsection 406(b) contemplates a contingency-fee agreement subject to a fixed maximum fee. Contingency fees often "provide the only practical means by which one * * * can economically afford * * * the services of a competent lawyer." Model Code of Prof'l Responsibility EC 2-20 (Am. Bar Ass'n 1980). This is particularly true of the "needy individuals" who qualify for Social Security benefits. 42 U.S.C. § 306(a). Interpreting § 406(b)'s cap to include fees awarded under § 406(a) would disincentivize attorneys from representing claimants and remove the only "practical means" by which needy claimants can attain representation.

Consider the following not uncommon case. One attorney represents a claimant before the agency and

the agency denies past-due benefits. Both the claimant and the attorney receive nothing. Another attorney specializing in work before the district courts agrees to seek judicial review of the adverse decision and is successful. Only that attorney's success makes it possible for the claimant and the earlier attorney to receive anything. If the earlier attorney is successful on agency remand, he will be entitled to any agreed-upon contingency fees subject to § 406(a)'s cap. As this Court has recognized, however, "virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 803 (2002) (internal quotation marks and citation omitted). The attorney who represented the claimant before the agency will thus be entitled under § 406(a) to fees of 25 percent of the claimant's overall award. If § 406(b)'s cap includes these fees, then the attorney who represented the claimant in court can receive no fees—even when it was this attorney's work before the court that made the § 406(a) award to the earlier attorney possible.

The possibility of the earlier attorney receiving all the fees available will strongly discourage other attorneys from helping claimants seek judicial review. It will also have a perverse knock-on effect. Realizing that no other attorney would likely agree to seek judicial review of an unfavorable initial agency decision, the earlier attorney will be less likely to represent a claimant in the initial agency proceedings. And even if the earlier attorney were willing to seek judicial review herself, she would understand that the

many more hours she would have to spend on that effort would entitle her to no more fees. Such prospects would discourage attorneys from taking on social security cases generally. In a world where contingency fees for general civil litigation typically "rang[e] from 33% to 50%" and "seldom amount to less than 33%" of the recovery, Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1347, 1351 (1996), the possibility of receiving fees of less than 25 percent, let alone no fees at all, would strongly discourage attorneys from representing Social Security beneficiaries, see *id.* at 1347 (discussing significant rates that lawyers typically receive under contingency fee agreements).

Ultimately, of course, claimaints themselves would suffer as they found it more and more difficult to find lawyers willing to represent them. This presents serious concerns for beneficiaries. Empirical studies show that legal representation for claimants is critical to their success. Based on recent data, federal courts review over 12,000 social security disability appeals per year. U.S. Gov't Accountability Off., GAO-07-331, *Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, but Needs to Manage Data Better on the Increasing Number of Court Remands* 3 (2007). Of those appeals, district courts remand half back to the agency for further review. *Ibid.* And in the remanded cases, 66 percent of the claimants are awarded benefits. *Ibid.* Discouraging attorneys from representing claimants, then, could potentially

withhold benefits from up to 4,000 deserving claimants per year.

Any concerns of attorneys abusing § 406 to reap "inordinately large fees," *e.g.*, *Dawson*, 425 F.2d at 1194 (internal quotation marks omitted), are misplaced, moreover. According to the most recent data, about 91 percent of claimant representatives in agency proceedings, which includes attorneys, make less than $100,000 in annual income. Off. of the Inspector Gen., SSA, *Informational Report: Agency Payments to Claimant Representatives*, No. A-05-15-15017, at 4 (2015). Attorneys who represent claimants in Social Security proceedings do not do so to get rich. They accept a relatively modest income to assist our society's most needy individuals.

D. Those Courts Holding That Section 406(b)'s 25-Percent Cap Applies To Fees Awarded For Both Administrative And In-Court Representation Misinterpret The Legislative History

Those courts aggregating agency and court fee awards under § 406(b) have relied almost exclusively on legislative history to reach this result. That is mistaken. Not only is such reliance suspect, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."), but the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *ibid.* Properly considered, however, the legislative history actually supports those courts on the other side of the split.

These courts base their analysis of the legislative history on two documents: Hearings before the Senate Committee on Finance and a Senate Report. *Morris* v. *Social Sec. Admin*, 689 F.2d 495, 497 (4th Cir. 1982) (discussing the Senate Report); *Dawson* v. *Finch*, 425 F.2d 1192, 1194-1195 nn.2-3 (5th Cir. 1970) (discussing both documents); App., *infra*, 11a (adopting the Fifth Circuit's legislative history analysis in *Dawson*). While these courts are correct that Congress was motivated, in part, by a desire to curb "inordinately large fees," *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965) (supplemental report submitted by the Dep't of Health, Educ., and Welfare) (HEW), these documents show that such concern was limited to fees in district court proceedings. As HEW explained in its report to the Senate Finance Committee:

> [A]ttorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in *Federal district court actions* arising under the social security program. Usually, these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Ibid. (emphasis added). The official Senate Report adopted this explanation nearly verbatim. S. Rep. No. 89-404, at 122 (1965). There was no concern expressed about fees awarded for representation before the

agency. That makes sense. Those fees often go to a different person and are already subject to reasonableness review by the agency or a separate 25-percent cap. See pp. 17-19, *supra* (describing statutory scheme). They could not lead to "inordinately large fees" going to the in-court lawyer.

III. This Recurring Issue Is Of National Importance

Section 406 affects the proper administration of several large national programs administered by the Social Security Administration (SSA), including the Old-Age, Survivors, and Disability Insurance program (OASDI) and the Supplemental Security Income program (SSI). Kimberley Dayton et al., *Advising the Elderly Client* § 18:50 (2017); Soc. Sec. Admin., *Understanding Supplemental Security Income (SSI) Overview—2017 Edition*, https://www.ssa.gov/ssi/text-over-ussi.htm; see also *Moriarty* v. *Colvin*, 806 F.3d 664, 667 (1st Cir. 2015) (describing how § 406 governs attorney's fees awarded in SSI cases). In 2015, 60 million Americans received OASDI benefits worth $886 billion. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2016*, at 1 (2017). In the same year, 8.3 million Americans received SSI benefits worth $55 billion. Soc. Sec. Admin., *Annual Statistical Supplement to the Social Securit Bulletin, 2016*, (2017). Combined, Social Security payments composed 23.9 percent of overall federal spending in 2015. Office of Mgmt. & Budget, *Historical Tables*, Table 8.3 (2017), https://www.whitehouse.gov/omb/budget/Historicals.

Beneficiaries of these programs are among the most vulnerable of Americans. In 2016, for example,

86 percent of SSI beneficiaries received payments because of blindness or disability. Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2017*, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.html#contributions. Among these disabled beneficiaries, "[t]he majority (87 percent) were disabled workers, 10.4 percent were disabled adult children, and 2.5 percent were disabled widow(er)s." Soc. Sec. Admin., *Annual Statistical Report on the Social Security Disability Insurance Program, 2015*, at 11 (2016), https://www.ssa.gov/policy/docs/statcomps/di_asr/2015/di_asr15.pdf. Among beneficiaries over the age of sixty-five—a demographic that comprises 26 percent of SSI beneficiaries—62 percent receive half of their income from Social Security. Soc. Sec. Admin., *Fast Facts & Figures About Social Security, 2017*, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.html#contributions; Soc. Sec. Admin., *SSI Annual Statistics Report, 2015*, at ii (Jan. 2017); see also Joyce Nicholas & Michael Wiseman, *Elderly Poverty and Supplemental Security Income*, 69 Soc. Sec. Bulletin 45 (2009), https://www.ssa.gov/policy/docs/ssb/v69n1/v69n1p45.html ("Elderly SSI recipients are very poor. Nearly 70 percent fall in the bottom fifth of the national income distribution, and about the same proportion fall in the bottom fifth of the income distribution among all elderly persons. Although correction for SSI underreporting reduces the official poverty rate for elderly SSI recipients, the revised absolute rate is still 38–40 percent when all SSI (and OASDI) benefits are included as income."). Among families receiving Social Security child benefits, many are impoverished because "although not targeted

toward low-income families, [these benefits] provide income maintenance for many such families, in part because the conditions that give rise to child benefit eligibility—death, disability, and retirement—often lead to family income loss." Christopher R. Tamborini et al., *A Profile of Social Security Child Beneficiaries and Their Families: Sociodemographic and Economic Characteristics*, 71 Soc. Sec. Bulletin 11 (2011), https://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.html. For these beneficiaries, receiving favorable determinations from the SSA is a virtual necessity.

The vast number of people who depend on social security benefits explains the abundance of claims at the agency and district court level. Disability beneficiaries in 2013 filed "approximately 3 million initial and 784,000 reconsideration claims." Off. of the Inspector Gen., Soc. Sec. Admin., *Fiscal Year 2013 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges* 117 (Dec. 2013), https://www.ssa.gov/finance/2013/OIG%202013%20AFR%20Mgmt%20Challenges.pdf. SSA had over 698,000 initial disability claims pending in September 2013. *Ibid.* During the year ending June 30, 2017, 18,953 social security cases were filed in district courts, making social security cases 6.98 percent of all civil cases filed in district court. *United States District Courts—National Judicial Caseload Profile*, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2017.pdf.

Attorneys who represent the claimants in these cases do not do so to get rich. Of people who represent claimants before the agency, for example, which

includes attorneys, 91 percent made less than $100,000 in annual income in tax year (TY) 2013. Off. of the Inspector Gen., Soc. Sec. Admin., *Informational Report: Agency Payments to Claimant Representatives*, A-05-15-15017, at 4 (July 2015), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-15-15017.pdf. Their median annual income related to SSA direct payments, moreover, was only $7,800 in TY 2013. *Ibid.*

It is also worth noting that attorney's fees awarded under § 406(b) may not exceed 25 percent of a claimant's "*past-due* benefits." 42 U.S.C. § 406(b)(1)(A) (emphasis added). As the term implies, past-due benefits include only the "amount of * * * monthly benefits credited * * * that have accumulated because of a favorable administrative determination or decision, *up to but not including the month SSA effectuates the primary beneficiary's decision.*" Soc. Sec. Admin., Program Operations Manual System, *Representative's Fee—Title II Past-Due Benefits* GN 03920.030 (emphasis added).

In addition to past-due benefits, a claimant deemed "disabled" receives monthly benefits "as long as [her] medical condition has not improved and [she] can't work." Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits*, at 1 (2017) [hereinafter *What You Need to Know*], *available at* https://www.ssa.gov/pubs/EN-05-10153.pdf. Also, a disabled claimant's family may qualify for benefits because of the claimant's disability. Soc. Sec. Admin., *Disability Benefits, January 2017*, at 10, *available at* https://www.ssa.gov/pubs/EN-05-10153.pdf. And finally, of critical importance, after two years of

receiving disability payments, a claimant automatically receives Medicare coverage. *What You Need to Know* 7. Old-age beneficiaries also receive benefits going forward that § 406(b) excludes from contingency-fee awards. 42 U.S.C. § 406(b).

Given the possibility that a disabled beneficiary will receive such wide-ranging forward-looking benefits, an attorney's fee of—at most—a quarter of the beneficiary's *past-due* benefits can be appreciated for what it is: a reasonable fee in return for critical work, unlikely to constitute the "inordinately large fee" that Congress feared. *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965). As the Ninth Circuit has noted, § 406(b) "limits attorneys' fees to a percentage of past-due benefits and allows no recovery from future benefits, which *may far exceed* the past-due benefits awarded." *Crawford* v. *Astrue*, 586 F.3d 1142, 1150 (2009) (emphasis added).

Having attorney representation greatly increases the likelihood of claimants being able to successfully recover past-due benefits to which they are entitled. Testimony of an expert before a House committee explains why that is the case:

> SSA's statistics for FY 2000 indicate that 74.9% of Title II disability claimants are represented by an attorney. Statistics for the same period indicate that the allowance rate at the hearing level for Title II disability claimants with representation is 63.6%; in contrast, the allowance rate for unrepresented Title II claimants is 40.1%. We would suggest that this difference is attributable to a number of reasons. The knowledgeable representative knows the sequential evaluation system

> set forth in the regulations and Social Security Rulings and knows the applicable standards. The representative can marshal evidence from treating medical sources, school systems, vocational testing, previous employers, etc. The knowledgeable representative can thoroughly cross-examine vocational and medical witnesses whom the ALJ has called. These are daunting tasks for pro se claimants, especially when we consider that they are in poor health and often have only limited education. Indeed, the statute requires SSA, whenever an adverse determination is sent to a claimant, to provide information on options for obtaining a private attorney as well as from legal services organizations providing free legal assistance.

Social Security's Processing of Attorney Fees: Hearing Before the Subcomm. on Soc. Sec. of the House Comm. on Ways & Means, 107th Cong. 50 (2001) (statement of Nancy G. Shor, Exec. Dir. of the Nat'l Org. of Soc. Sec. Claimants' Representatives). The hurdles a claimant seeking to recover past-due benefits faces are daunting, and social security attorneys are often necessary to vindicate claimants' rights. Section 406(b) determines whether vulnerable claimants can secure attorneys to represent them in court. Such representation is vital for them to be able to navigate our vast and complex social security program.

IV. This Case Provides An Ideal Vehicle For Resolving The Conflict

This petition presents a single issue of how to interpret an important provision of federal law. It involves no issues of fact or questions of state law. The split is clear and the issue is cleanly presented.

The issue presented is also outcome-determinative. Little would remain to be done. The district court has already determined what amounts would be due under the proper reading of § 406(b). In Ms. Wood's case, it would grant that amount. In Mr. Westfall's, it would allow him to request fees under § 406(a) from the agency.

The issue has also sufficiently percolated in the lower courts. Six courts of appeal have decided it and they are evenly split. Each case involved in the split presents similar facts and the opinions on each side largely rely on the same reasoning. The arguments in the courts of appeals have been exhausted. The issue is ripe for this Court's review and only this Court's review can bring uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2017

Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-13664

D.C. Docket No. 6:12-cv-00915-DAB

KATRINA F. WOOD,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 16-13665

D.C. Docket No. 6:12-cv-01882-KRS

CELALETTIN AKARCAY,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 16-13666

D.C. Docket No. 6:14-cv-00784-DAB

BILL J. WESTFALL,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant–Appellee.

No. 16-14004

D.C. Docket No. 6:13-cv-01336-KRS

DARLEEN R. SCHUSTER,

Plaintiff-Appellant,

RICHARD ALLEN CULBERTSON,

Petitioner-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(June 26, 2017)

Before MARTIN, JILL PRYOR, and ANDERSON, Circuit Judges.

MARTIN, Circuit Judge:

Richard Culbertson was counsel to the four plaintiffs shown in the caption here, who asked for and were awarded Social Security disability benefits. This appeal consolidates the four cases, and it is about attorney's fees for Mr. Culbertson. To his credit, Mr. Culbertson represented Katrina Wood, Celalettin Akarcay, Bill Westfall, and Darleen Schuster (together, the "claimants") in their successful challenge to the Commissioner of Social Security's decision to deny them disability benefits. After winning for these clients, Mr. Culbertson asked the District Court to award him attorney's fees in all four cases.[1]

Two statutes govern fees paid to lawyers representing Social Security claimants. First, 42 U.S.C. § 406 allows the Commissioner to set a fee for representation of the claimant at the administrative

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[1] Mr. Culbertson is the real party in interest in this appeal. See Gisbrecht v. Barnhart, 535 U.S. 789, 798 n.6, 122 S. Ct. 1817, 1823 n.6 (2002). Because Mr. Culbertson's attorney's fees will come out of the award that would otherwise go to his clients, the Commissioner now "plays a part in the fee determination resembling that of a trustee for the claimants." Id. To be clear about the parties' roles here, if Mr. Culbertson wins, his clients will get less money. If the Commissioner wins, they will get more. See id. at 804 n.13, 122 S. Ct. at 1826 n.13 (noting attorneys are "paid directly with funds withheld from their clients' benefits awards"); 42 U.S.C. § 406(a)(4).

level, id. § 406(a), and the District Court to set a fee for representation of the claimant in court, id. § 406(b). Second, a claimant can request fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). In this appeal, Mr. Culbertson argues that the District Court did not correctly calculate the fees he is entitled to under these statutes and Eleventh Circuit precedent. After careful consideration, and with the benefit of oral argument, we affirm the decisions of the District Court.[2]

I.

Mr. Culbertson represented all four of the captioned plaintiffs in appealing the Commissioner's denial of disability benefits to them. He was successful in all four appeals. We will set out a narrative about each of the cases, which is summarized in a chart in section I.E.

A. MS. WOOD

The District Court reversed the Commissioner's denial of benefits to Ms. Wood, then remanded her case to the Commissioner. The court later awarded Ms. Wood $4,107.27 in attorney's fees under the EAJA. On remand, the Commissioner awarded Ms. Wood past-due benefits of $30,871 and awarded her child $4,340 as an auxiliary beneficiary. As is customary, the Commissioner withheld 25% of the total award ($8,595.75) to pay attorney's fees. The Commissioner

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[2] The parties consented to jurisdiction by a U.S. Magistrate Judge in each case. We refer to the Magistrate Judges' orders as those of the District Court.

also awarded Mr. Culbertson $2,865 under § 406(a) for representing Ms. Wood at the administrative level.

Mr. Culbertson asked the District Court for attorney's fees of $4,488.48 under § 406(b) for representing Ms. Wood in court. He calculated this figure by subtracting the EAJA award from the 25% of the past-due benefits the Commissioner withheld. The court granted Mr. Culbertson's request in part, but limited his award to $1,623.48. The court declined to pay the full amount requested by Mr. Culbertson because it found he failed to subtract the earlier § 406(a) award in calculating his fees.

B. MR. AKARCAY

As with Ms. Wood's case, the District Court reversed the Commissioner's denial of benefits to Mr. Akarcay and remanded the case back to the Commissioner. The District Court later awarded Mr. Akarcay $3,121.70 in attorney's fees under the EAJA. On remand, the Commissioner awarded Mr. Akarcay past-due benefits of $69,047, withholding the usual 25% ($17,261.75) for attorney's fees.

Mr. Culbertson asked the District Court for permission to charge Mr. Akarcay $14,140.05 in attorney's fees under § 406(b), which was the amount withheld minus the EAJA award. The court denied Mr. Culbertson's request. The District Court reasoned that it could not determine the proper § 406(b) fee award without first knowing the attorney's fee award the Commissioner would grant under § 406(a). The District Court directed Mr. Culbertson to file a renewed motion after the Commissioner determined the § 406(a) fee award.

C. MS. SCHUSTER

As with the others, the District Court reversed the Commissioner's denial of disability benefits to Ms. Schuster. The court remanded the case back to the Commissioner and later awarded Ms. Schuster $4,988.17 in EAJA attorney's fees. On remand, the Commissioner awarded Ms. Schuster past-due benefits of $54,382, withholding 25% of the award ($13,595.50) for attorney's fees.

Mr. Culbertson sought $10,707.08[3] in attorney's fees under § 406(b). The District Court denied Mr. Culbertson's request, again reasoning that it could not decide the proper § 406(b) fee award until the Commissioner awarded attorney's fees under § 406(a). The District Court noted Mr. Culbertson could file a renewed motion after the § 406(a) fees were set.

D. MR. WESTFALL

Again in Mr. Westfall's case, the District Court reversed the Commissioner's denial of disability benefits to him. The court remanded the case to the Commissioner, and awarded Mr. Westfall $2,713.30 in EAJA attorney's fees. On remand, the Commissioner awarded Mr. Westfall past-due benefits of $24,157, withholding 25% ($6,039.25) for attorney's fees.

Mr. Culbertson asked for attorney's fees of $3,325.95 under § 406(b), which was the amount

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[3] Mr. Culbertson says he calculated this figure by subtracting the EAJA award from the 25% withheld from Ms. Schuster's past-due benefits. The District Court was correct in pointing out that there is an error in this calculation, which would have accurately been a request for $8,607.33.

withheld minus the EAJA award. In this case, as in some of the others, the Commissioner had not yet awarded § 406(a) fees. However, in contrast to the other cases, for Mr. Westfall's case, the District Court granted Mr. Culbertson's fee request "provided that counsel is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award." In other words, the District Court awarded Mr. Culbertson his 25% (in combined EAJA and § 406(b) fees), but told him he could not ask for more.

In the Westfall case, the Commissioner filed a Federal Rule of Civil Procedure 60 motion, asking the District Court to correct a legal error. The Commissioner argued the court erred to the extent it "direct[ed] the Commissioner not to award counsel § 406(a) fees," which is a decision "entrusted by statute exclusively to the Commissioner." The District Court denied the motion, saying its order barred counsel from requesting more fees and "did not purport to direct the Commissioner to take—or not take—any action."

E. SUMMARY

This chart summarizes the past-due benefits awarded and withheld; the attorney's fees awarded and requested; and the relevant District Court order in each claimant's case.

Petitioner	Ms. Wood	Mr. Alarcon	Ms. Schuster	Mr. Westhill
Past-Due Benefits Awarded	$35,211	$69,047	$54,382	$24,157
Past-Due Benefits Withheld (25%)	$8,595.75	$17,261.75	[illegible]30	$6,039.25
Amount Mr. Culbertson Received	$8,595.75	$3,121.70 plus future awards	$4,988.17 plus future awards	$6,039.25
EAJA Award	$4,107.27	$3,121.70	$4,988.17	$2,7137.30
§ 406(a) Award	$2,865	Pending	Pending	N/A
§ 406(b) Request (% of Past-Due Benefits)	$4,488.48 (12.7%)	$14,140.05 (20.5%)	$10,707.08 (19.7%)	$3,325.95 (13.8%)
District Court Decision on Mr. Culbertson's § 406(b) Request	Awarded $1,623.48 ($4,488.48 minus $2,865.00)	Denied request and ordered to refile after § 406(a) award is set	Denied request and ordered to refile after § 406(a) award is set	Awarded $3,325.95, but barred from seeking further fees under § 406(a)

II.

We review a district court's decision on attorney's fees for an abuse of discretion. See Watford v. Heckler, 765 F.2d 1562, 1569 n.11 (11th Cir. 1985). The district court's interpretation of a statute, we review de novo. Bergen v. Commissioner of Soc. Sec., 454 F.3d 1273, 1275 (11th Cir. 2006) (per curiam).

A.

As we've set out above, there are three statutory provisions allowing fees for lawyers representing people claiming Social Security disability benefits. Section 406(a) allows attorney's fees for representation of claimants at the administrative level. 42 U.S.C. § 406(a)(1). Section 406(a) requires the Commissioner to set a reasonable attorney's fee when it decides in favor of a claimant represented by an attorney. Id. A fee awarded under § 406(a) is paid out of the claimant's past-due benefits. Id. § 406(a)(4). Section 406(a)(1) does not itself limit the amount of fees the Commissioner can award.

Section 406(b) allows "a court entering judgment in favor of a Social Security benefits claimant" to set a reasonable attorney's fee for representing the claimant in court. Jackson v. Commissioner of Soc. Sec., 601 F.3d 1268, 1271 (11th Cir. 2010); see 42 U.S.C. § 406(b)(1)(A). A fee awarded under § 406(b) is also paid out of the claimant's past-due benefits. 42 U.S.C. § 406(b)(1)(A). This fee award can be no more than 25% of the total past-due benefits. Id.

The third statutory source of attorney's fees is the EAJA. "[S]uccessful Social Security benefits claimants may request a fee award under the EAJA" from the courts. Jackson, 601 F.3d at 1271. A court "shall" award this fee "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C § 2412(d)(1)(A). EAJA fees are paid by the government, and are not taken from the claimant's past-due benefits. See Jackson, 601 F.3d at 1271. Neither are EAJA fee awards limited. See Watford,

765 F.2d at 1566–67. Instead, EAJA fees are set by multiplying the hours spent on a case times a fixed hourly rate. See Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822.

For our purposes here, we note that the EAJA includes a "Savings Provision" that requires an attorney who is awarded fees under both the EAJA and § 406(b) to refund the smaller of the two awards to the claimant. 28 U.S.C. § 2412 note, Act of Aug. 5, 1985, Pub. L. No. 99–80, § 3, 99 Stat. 183, 186. "[T]he Savings Provision was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)." Jackson, 601 F.3d at 1272. "Thus, an EAJA award offsets an award under Section 406(b), so that the amount of the total past-due benefits the claimant actually receives will be increased by the EAJA award . . . ." Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (quotation omitted and alterations adopted). The Savings Provision makes clear that the government pays the EAJA award so that the claimant spends less of his past-due benefits on an attorney. In other words, EAJA does not exist so much to enrich the claimant's attorney as it does to protect the claimant.

B.

All parties point to Eleventh Circuit cases interpreting these fee-award statutes. Mr. Culbertson says Jackson explains the method by which he calculated his fee requests under § 406(b). 601 F.3d 1268. In Jackson, this Court considered whether the EAJA required an attorney to affirmatively refund the smaller of the EAJA and § 406(b) fees, or whether the attorney could get the same fee amount by reducing his § 406(b) fee request by the amount of the EAJA

award he'd received. Id. at 1269. Jackson concluded that attorneys were allowed to do the latter, because it "effectuate[s] the refund" required by the EAJA Savings Provision. Id. at 1274. Under either administrative approach, the attorney collects the same amount and the claimant receives the same amount. See id. at 1273 ("Regardless of whether the attorney writes a refund check to his client or deducts the amount of the EAJA award from his § 406(b) fee request, the purpose of the Savings Provision is fulfilled—the attorney does not get a double recovery.").

Our precedent also includes Dawson v. Finch, 425 F.2d 1192 (5th Cir. 1970),[4] which guided the District Court's consideration of the relationship between a fee award set by the Commissioner under § 406(a) and a fee award set by the courts under § 406(b). In Dawson, an attorney requested a fee under § 406(b) equal to 25% of his client's past-due benefits, even though the Commissioner already awarded him 25% of the past-due benefits under § 406(a). Id. at 1193. The Dawson panel ruled that the language and legislative history of § 406(b) "clearly indicate[d]" that the 25% cap on fees paid out of past-due benefits was designed "to insure that the old age benefits for retirees and disability benefits for the disabled . . . are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received." Id. at 1195. Thus, the

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[4] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

panel opined that the 25% limit from § 406(b) applies to total fees awarded under both § 406(a) and (b), "preclud[ing] the aggregate allowance of attorney's fees greater than 25 percent of the past due benefits received by the claimant." Id. (emphasis added).

In deciding Mr. Culbertson's fee requests under § 406(b) in each of the four cases, the District Court relied on Dawson. In Ms. Wood's case, the court looked to Dawson's holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits, and reduced Mr. Culbertson's fee request by the § 406(a) award he had received so as to limit his fee award to 25% of Ms. Wood's past-due benefits. In the other three cases, the Commissioner had not yet made an award under § 406(a). The District Court therefore relied on Dawson's holding when it declined to set § 406(b) fees for Mr. Akarcay's and Ms. Schuster's cases until the Commissioner determined § 406(a) fees. In Mr. Westfall's case, the District Court acknowledged Dawson's holding, but instead of waiting for the Commissioner to determine § 406(a) fees, granted Mr. Culbertson's § 406(b) fee request and at the same time barred him from requesting § 406(a) fees.

III.

Mr. Culbertson says the District Court erred in three ways: (1) by imposing a 25% cap on § 406 fees; (2) by including the EAJA awards in establishing the cap; and (3) by exceeding its authority in directing the Commissioner.

A.

Mr. Culbertson first says the District Court did not properly apply Dawson in capping his total fee awards at 25% of past-due benefits. He says Dawson distinguished between the amount that can be paid out from a claimant's past-due benefits and the fee awards the Commissioner and district court can "authorize." He argues that because the attorney in Dawson had already been paid 25% of the claimant's past-due benefits, the Dawson holding meant the attorney could not be paid more from those funds. Yet, he argues that Dawson did not limit the amount of fees that can be authorized under § 406. Unfortunately for Mr. Culbertson, this distinction is refuted by the words of the Dawson opinion itself. It said "[w]e are fully convinced that 42 U.S.C.[] [§] 406 precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant. Dawson has already been authorized by the Secretary to charge the maximum. He is entitled to no more." 425 F.2d at 1195 (emphases added).

Mr. Culbertson points out that some other circuits do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406. See Clark v. Astrue, 529 F.3d 1211, 1218 (9th Cir. 2008); Wrenn ex rel. Wrenn v. Astrue, 525 F.3d 931, 937–38 (10th Cir. 2008); Horenstein v. Sec'y of Health & Human Servs., 35 F.3d 261, 262 (6th Cir. 1994) (en banc). True, but at the same time all the cases he points to either explicitly or implicitly recognize that Dawson limited the combined § 406(a) and (b) attorney's fee awards to 25% of past-due benefits. See Clark, 529 F.3d at 1217 (disagreeing

with Dawson's holding); Wrenn, 525 F.3d at 937 (noting Dawson's holding); Horenstein, 35 F.3d at 262 (overruling Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972), which relied on Dawson's holding).[5]

To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided, this does not empower us to ignore it. We are bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc. See United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc). We conclude that the District Court did not err in its interpretation and application of Dawson.

B.

Mr. Culbertson next argues that since EAJA fees are not paid out of a claimant's past-due benefits, the District Court should not have included the EAJA fee awards when calculating whether his requests were within the 25% cap. He says that he has only asked for § 406(b) fees equal to "12.7%, 13.8%, [19.7%], and 20.5% of the total past due benefits awarded." But this argument is refuted by our precedent in Jackson, where this Court held an attorney could deduct the EAJA award from her § 406(b) request because this method "effectuate[s] the refund." 601 F.3d at 1274.

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[5] The Fifth Circuit continues to read Dawson to limit the aggregate award. See Murkeldove v. Astrue, 635 F.3d 784, 788 & n.1 (5th Cir. 2011); Rice v. Astrue, 609 F.3d 831, 835 & n.12 (5th Cir. 2010). And the Fourth Circuit relied on Dawson to support its holding that § 406(b) limits the combined § 406 fee award to 25% of past-due benefits. See Morris v. Social Sec. Admin., 689 F.2d 495, 497–98 (4th Cir. 1982).

Mr. Culbertson's request in Ms. Wood's case demonstrates how his fee requests deplete the claimants' past-due benefits without replenishing them with an EAJA refund, thereby running afoul of Jackson. In Ms. Wood's case, Mr. Culbertson asked for a total attorney's fee award of $11,460.75.[6] If he were awarded that amount, $1,242.27 of the funds withheld by the Commissioner for attorney's fees would be returned to Ms. Wood.[7] If, to the contrary, Mr. Culbertson had refunded Ms. Wood's EAJA award at the time he got the §406(b) award, he would have given her $4,107.27, and he likely would have kept all of the $8,595.75 withheld by the Commissioner from Ms. Wood's past-due benefits. Thus, Mr. Culbertson's proposal would result in Ms. Wood receiving only $1,242.27, while a refund of the EAJA award would have given her $4,107.27

This makes clear that Mr. Culbertson's request for fees does not comply with Jackson's requirement that he "effectuate the refund" when taking fees under both § 406(b) and the EAJA. Jackson anticipated that the claimant would get the same amount of money under either method. Mr. Culbertson's argument that the District Court should not have included the EAJA award within the 25% cap is therefore mistaken.

Although not what Mr. Culbertson proposed, our precedent would have allowed him to receive the EAJA

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[6] This amount is equal to the total of $4,107.27 in EAJA fees; $2,865 in § 406(a) fees; and the $4,488.48 requested under § 406(b).

[7] $8,595.75 withheld by the Commissioner minus $2,865 in § 406(a) fees and minus Mr. Culbertson's request of $4488.48 in § 406(b) fees would leave $1,242.27 for Ms. Wood.

fees in lieu of a larger § 406(b) award because Ms. Wood would then have a greater share of the remaining withheld past-due benefits. See Jackson 601 F.3d at 1273 ("By deducting the amount of the EAJA award from his § 406(b) fee request, [the attorney] reduced the amount that [the claimant] would otherwise be required to pay in § 406(b) fees, thereby increasing the portion of past-due benefits payable directly to [the claimant].") What Mr. Culbertson did propose was to have the District Court use his requested § 406(b) award in calculating the 25% cap. This would have allowed Mr. Culbertson to keep the EAJA award and also deplete the withheld past-due benefits. To preserve Ms. Wood's refund, it is therefore necessary for the District Court to add Mr. Culbertson's requested § 406(b) fee together with his EAJA award to arrive at the "true § 406(b) award" for the purposes of the 25% cap. This method of calculation complies with our precedent, as well as Congress's intent in enacting the Savings Provision. See id. at 1272–73; see also Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (noting the Savings Provision works to increase "the amount of the total past-due benefits the claimant actually receives" (quotation omitted and alteration adopted)).

C.

Finally, Mr. Culbertson argues the District Court exceeded its authority in its directions to the Commissioner. The Commissioner agrees that the District Court exceeded its power in directing the Commissioner in Mr. Westfall's case, to the extent the District Court imposed requirements on the

Commissioner. Yet, the Commissioner says the District Court's orders were otherwise correct.

We do not read the District Court order in Mr. Westfall's case in the way that the parties read it. It seems clear to us that, as explained in its Rule 60 order, the District Court order granting § 406(b) fees imposed no requirements on the Commissioner. The court simply barred Mr. Culbertson from seeking more fees, and in doing so, acted within its powers. See Farese v. Scherer, 342 F.3d 1223, 1232 n.11 (11th Cir. 2003) (per curiam) ("We have long held that powers incidental to the federal court include the authority to control and discipline attorneys appearing before it." (quotation omitted)). The court also acted within its authority in Mr. Akarcay's and Ms. Schuster's cases in denying Mr. Culbertson's § 406(b) requests, saying that he could refile them after the Commissioner makes the § 406(a) fee determinations. See id. We see no abuse of discretion by the District Court in its fashioning of these methods to comply with our precedent. See Watford, 765 F.2d at 1569 n.11. We therefore affirm the District Court in each case.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATRINA F. WOOD,

Plaintiff,

Case No. 6:12-cv-915-Orl-DAB

-vs-

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration with oral argument on the following motion filed herein:

MOTION:	**AMENDED CONSENT MOTION FOR ATTORNEY'S FEES (Doc. 40)**
FILED:	**December 17, 2015**

THEREON it is **ORDERED** that the motion is **GRANTED in part**.

Introduction

Counsel's motion for authorization to charge a reasonable fee follows the issuance of an Order and Judgment reversing the decision of the Commissioner of Social Security with respect to Plaintiff's claim for benefits, and remanding the case pursuant to sentence four of 42 U.S.C. § 405(g) (Docs. 21 & 22). As set forth in the motion, Plaintiff's attorney, Richard Culbertson, petitions this Court pursuant to 42 U.S.C. §406(b) for authorization to charge his client a fee for federal court representation in the amount of $4,488.48. This fee is based on a contingency fee agreement between counsel and Plaintiff (Doc. 26-1), and the Commissioner's letter notifications that Plaintiff and her auxiliary beneficiaries were awarded past due benefits. Doc. 26-2, 26-3. The Commissioner filed a Response objecting to Plaintiff's calculation of the fee, which did not include a deduction for the § 406(a) fees previously awarded to Plaintiff's counsel. Upon review, the motion is **GRANTED in part**.

Analysis

I. The statutory framework

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under §406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-

five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and the Equal Access to Justice Act, 28 U.S.C. § 2142(d) ("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which is paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Commissioner of Soc. Sec.*, 518 F. App'x. 673 (11th Cir. 2013); *Bookman v. Commissioner of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).[2]

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit.

[2]In the Eleventh Circuit, unpublished decisions are not binding, but are persuasive authority. *See* 11th Cir. R. 36-2.

In contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that "where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds *to the claimant* the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (unmodified) (emphasis added).[3] *See Jackson v. Commissioner of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As discussed at great length in *Westfall v. Comm. of Social Security*, Case No. 6:14-cv-784-DAB (M.D. Fla. April 19, 2016) (Doc. 33), in this circuit, the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits, and double payment under the EAJA is not allowed. *See Paltan v. Comm'r of Soc. Sec.*, 518 F. App'x. 673, 674 (11th Cir. 2013); *Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).

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[3]Note that the refund is not to the government, but to the claimant. This is consistent with Supreme Court precedent noting that the fee is awarded to the prevailing party, not the party's attorney. *See Astrue v. Ratliff*, 560 U.S.586, 130 S. Ct. 2521, 177 L.Ed. 2d 91 (2010).

II. Calculation of fees in this case

In this case, counsel seeks a §406(b) award of $4,488.48, calculated by deducting *only* the $4,107.27 EAJA award counsel has already received, from the $8,595.75 withheld by the Commissioner (25% of past due benefits), and omitting any deduction for the § 406(a) fee previously awarded. *See* Doc. 26. As noted by the Commissioner, Plaintiff's counsel erroneously fails to deduct the § 406(a) fee award of $2,865, which would result in a net fee award of $1,623.48. Doc. 27.

Directly on point is the Eleventh Circuit's per curiam opinion in *Paltan v. Commissioner of Social Security*, 518 F. App'x. 673, 674 (11th Cir. 2013), affirming the decision of this Court which deducted the § 406(a) fee previously awarded:

> George Paltan appeals the district court's [] award of attorney's fees under 42 U.S.C. § 406(b) to Richard Culbertson, his attorney before the district court in a challenge to the Social Security Administration's denial of his application for disability insurance benefits and supplemental security income. On appeal, Paltan argues the district court erred by awarding Culbertson attorney's fees in the amount of $182.91, rather than $4,281.83. **He maintains the district court erroneously concluded that the total amount of attorney's fees recoverable under 42 U.S.C.§ 406(a), § 406(b), and the Equal Access to Justice Act (EAJA), 28 U.S.C.§ 2412(d), could not exceed 25% of Paltan's past-due benefits.**

The district court did not err in its attorney's fees calculation.[] Paltan was represented in his proceedings before the Social Security Administration by J. Michael Matthews. After the Commissioner of Social Security denied Paltan's application for benefits, Paltan, represented by Culbertson, successfully appealed to the district court. Following the district court's remand, the Social Security Administration awarded Paltan $38,327.35 in past-due benefits. Accordingly, Matthews and Culbertson could receive, in the aggregate, 25% of those past-due benefits as attorney's fees, or $9,581.83. *See Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970) (holding that 42 U.S.C.§ 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant.").[] Because Matthews received $5,300.00 in attorney's fees pursuant to 42 U.S.C.§ 406(a) for his work before the Social Security Administration, Culbertson was entitled only to $4,281.83 under § 406(b) for his work before the district court–i.e., the remainder of the $9,581.83 of past-due benefits available for attorney's fees. *See Dawson*, 425 F.2d at 1195.

Culbertson, however, previously obtained an attorney's fees award of $4,098.92 under the EAJA for the work he did before the district court. As such, the "Savings Provision" of the EAJA required Culbertson to refund either the EAJA award or the § 406(b) award, whichever was smaller. 28 U.S.C. § 2412, note; Pub. L. No.

99-80, § 3, 99 Stat. 186 (1985); *see also Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271-72 (11th Cir. 2010). Because the $4,098.92 EAJA award was smaller than the § 406(b) award of $4,281.83, Culbertson was required to refund the EAJA award to Paltan. Culbertson had the option of either refunding the EAJA award to Paltan directly, or reducing his § 406(b) award by $4,098.92, leaving him with a § 406(b) award of $182.91, the figure calculated by the district court.[] *See Jackson*, 601 F.3d at 1274 (explaining that an attorney who receives fees under both the EAJA and § 406(b) "may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) fee request").

In performing this calculus, the district court did not create a new rule limiting attorney's fees awards under § 406(a), § 406(b), and the EAJA to 25% of a claimant's past-due benefits. Instead, the district court followed binding Circuit precedent in imposing a 25% cap on attorney's fees under § 406(a) and (b) in the aggregate. The court, moreover, did not err by refusing to allow Culbertson to offset his EAJA award by deducting it from the total of Paltan's past-due benefits, which included the § 406(a) award to Matthews, or by prohibiting Culbertson from receiving double payment under the EAJA and § 406(b) for representing Paltan before the district court. *See id.* at 1272 ("We have previously recognized that the Savings Provision was intended to prevent attorneys

> from receiving double recovery under both the EAJA and § 406(b)."). Accordingly, we affirm the district court's award of attorney's fees.

Paltan, 518 F. App'x 673, 673-75 (11th Cir. 2013) (emphasis added and footnotes omitted). *See Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314, 316 (11th Cir. 2012) (affirming the district court as not authorized to award additional attorney's fees under § 406(b) where the SSA had already awarded 25% of the claimant's past-due benefits to her attorney under § 406(a), and any additional award under § 406(b) would have resulted in an aggregate award that exceeded the maximum allowable under § 406).

Under the dictates of the Eleventh Circuit's holding in *Jackson v. Commissioner of Social Security*, 601 F.3d 1268, 1271 (11th Cir. 2010), the claimant is entitled to the full benefit of the EAJA award unless the EAJA award exceeds the §406(b) fee. In cases where the funds withheld by the Commissioner are sufficient to cover the §406(b) fee, counsel has the option of refunding the EAJA award to the claimant or reducing the §406(b) fee by the same amount. *Id.* In cases where the withheld funds are insufficient to pay the entire approved §406(b) fee, counsel may collect only so much of the withheld funds as leaves the claimant with the full EAJA award – again, unless the EAJA award exceeds the available §406(b) funds. Thus, regardless of whether it is offset by refund directly to the claimant, or retained by counsel and deducted from the §406(b) request, the EAJA award cannot be ignored and must be accounted for in the

§406(b) calculation.[4] The Court will continue to utilize the methodology approved by the Eleventh Circuit in *Paltan*. Accordingly, the appropriate calculation for the §406(b) award is to subtract the $4,107.27 EAJA award counsel has already received from the $8,595.75 withheld by the Commissioner (25% of past due benefits), which results in $4,488.48, minus the § 406(a) of $2,865 previously awarded, which would result in a net fee award of **$1,623.48**.

III. Reasonableness of resulting fee award

To evaluate an attorney's § 406(b) petition, the Court must determine whether the fee requested is reasonable. *Gisbrecht v. Barnhart*, 535 U.S. 739, 122 S.Ct. 1817 (2002). According to their Fee Agreement, Plaintiff retained Mr. Culbertson on June 6, 2012, for representation in federal court. Doc. 26-1. The "best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Whalen v. Commissioner of Social Security*, Case No. 6:10cv865-Orl-22DAB, 2012 WL 2798486, *2 (M.D. Fla. 2012) (citing *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir.1990)). However, "[a] fee pursuant to a contingency contract is not *per se* reasonable." *McGuire v. Sullivan*, 873 F.2d 974, 979 (7th Cir. 1989). The contingency fee negotiated by the claimant and her counsel is not reasonable if the agreement calls for fees greater than the twenty-five percent (25%) statutory limit, the agreement involved

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[4]This is not to say that the Court must order the refund or oversee payment. Jackson makes clear that it is counsel's obligation under penalty of law to effectuate the offset.

fraud or "overreaching" in its making, the resolution of the case was unreasonably delayed by the acts of the claimant's attorney, or would provide a fee "so large as to be windfall to the attorney." *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 981; *Rodriguez v. Bowen*, 865 F.2d 739, 746 (6th Cir.1989). "Because section 406(b) requires an affirmative judicial finding that the fee allowed is 'reasonable,' the attorney bears the burden of persuasion that the statutory requirement has been satisfied." *Gisbrecht*, 122 S.Ct. at 1828 n. 17.

Upon review of the supporting papers filed by Plaintiff's counsel, the Court finds that the net fee award of $1,623.48 is reasonable, and an award is appropriate under § 406(b). Counsel previously filed a fee motion stating that two experienced attorneys spent 22.3 hours of attorney time on the federal appeal in this case. Doc. 23. Due to counsel's efforts, Plaintiff was awarded approximately $35,211.00 ($30,871.00 + $4,340.00 in auxiliary beneficiary benefits) in wrongfully denied past-due benefits[5] to date, as well as ongoing benefits and medical coverage. Mr. Culbertson is an appellate attorney who has specialized in Social Security law for more than 30 years; his associate Sarah Fay is also experienced in Social Security law. Plaintiff's case was complex and she had an extensive medical history, having been treated for diabetes, peripheral neuropathy, high

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[5]The Commissioner points out an error in Plaintiff's calculation of the total amount of benefits to the auxiliary beneficiaries, however, Plaintiff's calculation of the amount withheld for attorney's fees ($8,595.75) is correct. See Doc. 27 at 2.

blood pressure, depression, and restless leg syndrome. Doc. 21 at 1.

Plaintiff originally filed for benefits on April 21, 2008, alleging an onset of disability on November 19, 2007. Doc. 28. The ALJ found Plaintiff not disabled, the Appeals Council denied review and Mr. Culbertson filed the appeal on Plaintiff's behalf in this Court on June 18, 2012. Doc. 1. The Court found that the ALJ failed to failed to [sic] adequately address Plaintiff's multiple sclerosis diagnosis and diabetic neuropathy. Doc. 21.

On September 16, 2013, the Court reversed and remanded the ALJ's decision. Doc. 21, 22. *Id.* On remand, Plaintiff was subsequently awarded benefits in February 2016. Doc. 26. Thus, almost eight years after first applying for benefits, Plaintiff received the past due benefits award in 2016. Doc. 40.

Through counsel's efforts, the decision of the ALJ was reversed and remanded based on sentence four of 42 U.S.C. §405(g), before the ALJ issued a favorable decision finding Plaintiff disabled from February 2012 and awarding of benefits. Plaintiff has received an award totaling approximately $35,000 in past-due benefits. Doc. 26. The fee award is not a windfall and is consistent with that agreed to by Plaintiff and the net amount awarded by the Court is uncontested by the Commissioner. Moreover, it is far less than § 406(b)(1) fees approved pursuant to contingent fee arrangements in other Social Security cases in this District. *See, e.g., Gorgoglione v. Commissioner*, No. 8:13-CV-953-T-33TBS, 2015 WL 2094909 (M.D.Fla. May 5, 2015) ($25,325.72); *Bibber*, 2015 WL 476190 at *6 ($24,386); *Taggart v. Commissioner*, No. 6:12–cv–

1068–Orl–TBS, 2014 WL 5320556, at *1 (M.D.Fla. Oct.17, 2014) ($24,580.25); *Hatchett v. Commissioner*, No. 6:11–cv–1810–Orl–18TBS, 2014 WL 293464, at *2 (M.D.Fla. Jan. 27, 2014) ($23,180); *White v. Commissioner*, No. 6:09–cv–1208–Orl–28GJK, 2012 WL 1900562, at *6 (M.D.Fla. May 2, 2012) ($36,680.78); *McKee v. Commissioner*, No. 6:07-cv-1554-Orl-28KRS, 2008 WL 4456453, at *7 (M.D.Fla. Sept. 30, 2008) ($20,768.00, less EAJA fees). The Court finds that the sum sought is reasonable and an award of **$1,623.48** is appropriate under § 406(b).

DONE and **ORDERED** in Orlando, Florida on April 20, 2016.

/s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BILL WESTFALL,
Plaintiff,

-vs- **Case No. 6:14-cv-784-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**UNOPPOSED REQUEST FOR AUTHORIZATION TO CHARGE A REASONABLE FEE UNDER 42 U.S.C 406(B) (Doc. No. 25)**
FILED:	**November 9, 2015**

THEREON it is **ORDERED** that the motion is **GRANTED,** with a caveat, as set forth herein.

Counsel's motion for authorization to charge a reasonable fee follows the issuance of an Order and Judgment reversing the decision of the Commissioner

of Social Security with respect to Plaintiff's claim for benefits, and remanding the case pursuant to sentence four of 42 U.S.C. § 405(g) (Docs. 20 & 21). As set forth in the motion, Plaintiff's attorney, Richard A. Culbertson, petitions this Court pursuant to 42 U.S.C. §406(b) for authorization to charge his client a fee for federal court representation in the amount of $3,325.95. This fee is based on a contingency fee agreement between counsel and Plaintiff and counsel's calculations regarding past due benefits received by Plaintiff. Upon review, the motion is **granted, as follows.**

Standards of Law

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under Section 406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and 28 U.S.C. § 2142(d) ("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which are paid out of the claimant's past-due benefits awarded. 42 U.S.C.

§ 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Commissioner of Social Security*, 518 Fed. Appx. 673 (11th Cir. 2013); *Bookman v. Commissioner of Social Security*, 490 Fed. Appx. 314 (11th Cir. 2012).

By contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that "where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (uncodified). *See Jackson v. Commissioner of Social Security*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit.

that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits and "double dipping" under the EAJA is not allowed, the Court generally needs to know the amount awarded under § 406(a) (if any), amounts paid under EAJA (if any), and the total amount of past due benefits calculated by the agency, in order to evaluate a § 406(b) motion.

Analysis

Applied here, this Court previously entered judgment in Plaintiff's favor, with remand for further administrative proceedings. Counsel requested and received an award under the EAJA in the amount of $2,713.30 (Doc. 23). On remand, the agency found Plaintiff to be disabled and Petitioner was notified that the Plaintiff was awarded past-due benefits. The Social Security Administration advised that it was withholding a total of $6,039.25 representing 25% of the past-due benefits of the Plaintiff (Doc. 25-2). In his motion, counsel seeks a net fee of $3,325.95 (25% of the past-due benefits minus the EAJA fees awarded). No allowance is made for any potential §406(a) award. The Court observes that the fee requested here plus the retention of the EAJA payment equals the full 25% cap, leaving no additional funds available to award to this (or any other) counsel under Section 406(a), as a matter of law. *See Dawson, Paltan, Bookman, supra.*

Plaintiff's counsel states that: "No fees have been paid at the administrative level (Appendix 2), and Petitioner does not intend to file a fee petition under

42 U.S.C. § 406(a) for work done at the administrative level." (Doc. 25, pg. 2). Petitioner was Plaintiff's counsel in the administrative proceedings and the administrative record includes his acceptance of appointment and contract for legal services before the agency (Doc. 13, R. 120-22). Notably, the Appointment does not include an executed waiver of any 406(a)fee. *Id.* The Court accepts counsel's current statement as a waiver of any right to seek a 406(a) fee. Even though Mr. Culbertson was counsel at the administrative level, an award of $3,325.95 under Section 406(b) and retention of the EAJA fee constitutes all compensation available to him in this matter, from all sources.

Petitioner contends that the amount of the fee requested is reasonable under §406(b) and *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S.Ct. 1817, 70 U.S.L.W. 4477 (2002). As the undersigned noted in *Whalen v. Commissioner of Social Security*, the "best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." Case No. 6:10-cv-865-Orl-22DAB, 2012 WL 2798486, *2 (M.D. Fla. 2012) (citing *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir.1990)). However, "[a] fee pursuant to a contingency contract is not *per se* reasonable." *McGuire v. Sullivan*, 873 F.2d 974, 979 (7th Cir.1989). The contingency fee negotiated by the claimant and his counsel is not reasonable if the agreement calls for fees greater than the twenty-five percent (25%) statutory limit, the agreement involved fraud or "overreaching" in its making, the resolution of the case was unreasonably delayed by the acts of the claimant's attorney, or would provide a fee "so large as to be

windfall to the attorney." *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 981; *Rodriguez v. Bowen*, 865 F.2d 739, 746 (6th Cir.1989). "[B]ecause section 406(b) requires an affirmative judicial finding that the fee allowed is 'reasonable,' the attorney bears the burden of persuasion that the statutory requirement has been satisfied." *Gisbrecht*, 122 S.Ct. at 1828 n. 17. To the extent the fee agreement is interpreted to allow for a *total* award at or below the cap the Court finds the request here to be reasonable under the principles of *Gisbrecht*.[2]

The Motion for authorization to charge a reasonable fee for federal court representation under § 406(b) is therefore **GRANTED** to the extent counsel is authorized to charge his client $3,325.95, consistent with the fee agreement, **provided that counsel** is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award.

DONE and **ORDERED** in Orlando, Florida on November 17, 2015.

/s/
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

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[2]According to the papers, counsel spent at least 28.2 hours in federal court effort (Doc. 27). As such, the total fee is not a windfall and is consistent with that agreed to by Plaintiff and uncontested by the Commissioner.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BILL WESTFALL,

Plaintiff,

-vs- **Case No. 6:14-cv-784-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration with oral argument on the following motion filed herein:

MOTION:	**DEFENDANT'S MOTION FOR RELIEF FROM ORDER PURSUANT TO RULE 60 (Doc. No. 27)**
FILED:	**November 24, 2015**

THEREON it is **ORDERED** that the motion is **DENIED**.

The Court held argument in this and related cases, on the issue of awarding §406(b) fees (Doc. 29). Leave was granted to file supplemental papers in the relevant cases, and the parties have filed a Joint Response (Doc. 31) and a Joint Analysis (Doc. 32). In the instant motion, the Commissioner moves for "relief, in part" from the Court's November 17, 2015 Order ("the Order") granting Plaintiff's counsel's unopposed motion to charge his client a reasonable fee (Doc. 26). The basis cited for the motion is the authority of the Court to correct "mistakes" in its orders or judgments. Rule 60(a),(b)(1), Fed. R. Civ. P. (2015). Upon close review, and for the reasons set forth herein, the Court sees no such mistake and the motion is **denied.**

Analysis

I. The statutory framework

There are three statutory provisions under which attorneys representing claimants in Social Security Disability cases may be compensated: 42 U.S.C. §§ 406(a) and 406(b), and 28 U.S.C. § 2142(d). Section 406(a) provides the exclusive avenue for attorneys seeking fees for work done before the Commissioner at the administrative level. The fees awarded under §406(a) are paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(a)(2)(A) and (B). Section 406(a) caps the fees that may be awarded at twenty-five percent of past-due benefits awarded or a lesser fixed amount. 42 U.S.C. § 406(a)(2)(A)(ii)(I)-(II).

For fees incurred representing claimants in federal court, claimants and their attorneys may seek fees under two statutory provisions, 42 U.S.C. § 406(b) and the Equal Access to Justice Act, 28 U.S.C. § 2142(d)

("the EAJA"). Under Section 406(b), upon entry of judgment in favor of a claimant, the Court may award a reasonable fee for work performed before the Court, which is paid out of the claimant's past-due benefits awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) imposes a cap on the total amount of fees that may be awarded. 42 U.S.C. § 406(b)(1)(A). Section 406(b) provides that a Court may not award fees "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. § 406(b)(1)(A).

The Fifth Circuit has held that 42 U.S.C. § 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). Thus, in this circuit,[1] the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits. *See Paltan v. Comm'r of Soc. Sec.*, 518 F. App'x. 673 (11th Cir. 2013); *Bookman v. Comm'r of Soc. Sec.*, 490 F. App'x 314 (11th Cir. 2012).[2]

By contrast, the EAJA permits a *claimant* to seek an award of fees against *the government* for work that is done before the Court if the claimant prevailed and the position of the Commissioner is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The EAJA contains a Savings Provision, however, that provides that

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[1]In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the law of the former Fifth Circuit

[2]In the Eleventh Circuit, unpublished decisions are not binding, but are persuasive authority. *See* 11th Cir. R. 36-2.

"where the claimant's attorney receives fees for the same work under both [406(b) and the EAJA], the claimant's attorney refunds *to the claimant* the amount of the smaller fee." 28 U.S.C. 2412 note, Act of Aug. 5, 1985, Pub.L. No. 99-80, § 3, 99 Stat. 183, 186 (unmodified) (emphasis added).[3] *See Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010) (noting that the attorney may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) request).

As the total fee under Sections 406(a) and (b) cannot exceed 25% of the past-due benefits and double payment under the EAJA is not allowed, the Court has previously determined that it needs to know the amount awarded under § 406(a) (if any), amounts paid under EAJA (if any), and the total amount of past due benefits calculated by the agency, in order to evaluate a §406(b) motion.

II. The need for complete information

Here, counsel sought a §406(b) award of $3,325.95, (25% of the past-due benefits minus the EAJA fees awarded). Mr. Culbertson represented that: "No fees have been paid at the administrative level (Appendix 2), and Petitioner does not intend to file a fee petition under 42 U.S.C. § 406(a) for work done at the administrative level." (Doc. 25, pg. 2). As the motion

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[3]Note that the refund is not to the government, but to the claimant. This is consistent with Supreme Court precedent noting that the fee is awarded to the prevailing party, not the party's attorney. *See Astrue v. Ratliff*, 560 U.S.586, 130 S. Ct. 2521, 177 L.Ed. 2d 91 (2010).

had merit, but the amount sought plus retention of the EAJA fees equaled the 25% cap, the Court granted the motion, but barred counsel from any further request for fees in this matter, pursuant to §406(a) or otherwise (Doc. 26). The Commissioner's motion followed.

Following the filing of this motion, Mr. Culbertson advised the Court "that he is entitled to an attorney fee under 42 U.S.C. § 406(a) for a significant amount of work done at the administrative level" and he does not waive his right to file a fee petition under 42 U.S.C. § 406(a) (Doc. 28). This is problematic. As aggregate attorney's fees cannot exceed the 25% cap, the Court cannot assure itself, without knowing the status of any §406(a) claim(s), that granting the full §406(b) award sought will not run afoul of *Dawson*.

III. The Court's proposed solution and the parties' response

In cases where, as here, counsel has been unable or unwilling to disclose the §406(a) amounts awarded by the Commissioner,[4] and the sought-after award of §406(b) fees, when coupled with the retained EAJA fee, would constitute an award of the entire amount of the 25% cap; the Court has sought to comply with *Dawson* by adding the following admonition to any "full cap" §406(b) award:

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[4]Some practitioners may seek to obtain the full 25% award *and* retain the EAJA fee by obtaining the EAJA first, then "deducting" the amount of the EAJA award from a §406(b) petition and award (which would leave a balance equal to the EAJA award with the Commissioner), and then seeking that balance under §406(a). *See, generally, infra.*

> provided that counsel is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award.

This provision has been objected to by the Commissioner and the social security practitioners, who, in their collective responses, ask the Court to substitute the following:

> This court approves $XXXX in 406(b) fees in this matter. However, the amount of 406(b) fees authorized combined with the total amount of 406(a) fees already approved and authorized shall not exceed twenty-five percent of the total past-due benefits payable to Plaintiff.

(Docs. 29, 30). This provision would be acceptable *if* all possible §406(a) fees had, indeed, been "already approved and authorized" at the time of filing of the §406(b) petition. There is no showing by any of the parties, however, that such is the case. This is the root of the complex problem presented to the Court.

As explained by Judge Dalton in a similar case:

> Relying on Ninth Circuit precedent, [claimant's attorney] contends that § 406(a) does not impose the same 25–percent fee restriction on the Commissioner that § 406(b) imposes upon courts. (*See id.* at 6 (citing *Clark v. Astrue*, 529 F.3d 1211, 1216 (9th Cir.2008)).) [Claimant's attorney] thus argues that he should be entitled to first seek from courts the maximum 25–percent § 406(b) fee award and then seek from the Commissioner further § 406(a) fees,

resulting in an aggregate § 406 award exceeding 25 percent of his client's past due benefits. (*See id.* at 6–8.) Magistrate Judge Baker's recommendation to the contrary, [counsel] argues, would result in federal courts impermissibly encroaching upon the authority of the Commissioner. (*See id.*)

The Court disagrees. As [counsel] well knows,[fn omitted] the question of whether attorney's fees awarded under §§ 406(a) and (b) can exceed 25 percent in the aggregate has not been "novel" in this Circuit since 1970, when the *Dawson* court held that they cannot. *See* 425 F.2d at 1195. Regardless of [counsel's] Ninth Circuit authority, *Dawson* binds the Court and forecloses it from awarding any § 406(b) fee that will result in an aggregate § 406 award in excess of 25 percent of a claimant's past-due benefits. *See id.*

As Magistrate Judge Baker notes, complying with *Dawson's* aggregation limitation is ordinarily a straightforward arithmetic exercise; Social Security attorneys typically obtain a § 406(a) fee authorization before making their § 406(b) request, and thus courts can subtract the § 406(a) fee from 25 percent of the claimant's past-due benefits to determine the maximum allowable § 406(b) award. (*See* Doc. 28, p. 3.) Here though, by seeking a § 406(b) award prior to seeking a § 406(a) award, [claimant's attorney] has (intentionally) made that calculation impossible.

> The Court cannot permit [counsel] to circumvent the *Dawson* aggregate-fee limit by requesting § 406(b) fees prior to requesting § 406(a) fees. The 25–percent aggregate § 406 cap discussed in *Dawson* is not a technical formality; it is designed, among other things, to prevent attorneys from charging "inordinately large fees for representing claimants in Federal district court." 425 F.2d at 1194. As *Dawson* remains binding, the Court will not shirk its obligation to enforce the 25-percent cap.
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> Based on [counsel's] representation that he intends to make his §§ 406(a) and (b) requests in reverse order to circumvent the *Dawson* aggregation limit, the Magistrate Judge could reasonably have recommended denying [counsel's] § 406(b) fee request without prejudice to its reassertion after he either obtains a finite § 406(a) authorization from the Commissioner or agrees not to seek one, after which the Court would be able to make a concrete § 406(b) determination. However, the Magistrate Judge evidently elected not to recommend such a needless waste of judicial and administrative resources, and instead recommends authorizing the full § 406(b) award on the condition that [claimant's attorney] be precluded from seeking further § 406(a) fees. (*See* Doc. 28, p. 5.) The Court finds Magistrate Judge Baker's recommended approach to be reasonable and consistent with its obligations under *Dawson*, and thus it will adopt and confirm the R & R.

Bibber v. Comm'r of Soc. Sec., No. 6:12-cv-1337-ORL, 2015 WL 476190, at *2-3 (M.D. Fla. Feb. 5, 2015). Absent knowledge of the amount of §406(a) fees and assurance that the cap has not *and will not* be exceeded by virtue of the §406(b) award, the Court cannot comply with the mandates of *Dawson* and assure that it is not inadvertently assisting counsel in the "double recovery" prohibited by the EAJA.

Nothing presented by the Commissioner or counsel at argument or in the Responses filed (Doc. 29, 30) changes this conclusion. The parties contend that: 1) *Dawson* is not controlling, because that Court "did not hold that the total 406(a) fees and 406(b) fees awarded cannot ever exceed twenty-five percent of the claimant's past-due benefits" (Doc. 30, p. 5); 2) *Paltan* and *Bookman* are unpublished, not binding, and not persuasive; and 3) the Court should follow the unreported district court case of *White v. Comm'r of Soc. Sec.*, 2012 WL 1900562 (M.D. Fla. May 2, 2012) (adopted and confirmed by *White v. Comm'r of Soc. Sec.*, 2012 1890558 (M.D. Fla. May 24, 2012) instead.

— ***Dawson* continues to apply**

The parties' construction of *Dawson* is, at best, odd. At issue in *Dawson* was "allowance of a total fee in excess of twenty-five percent of past due benefits." 425 F. 2d at 1195. Stating "[w]e are fully convinced that 42 U.S.C.A. 406 precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant," 425 F.2d at 1195, the *Dawson* court affirmed the decision of the lower court which "conclud[ed] that 42 U.S.C.A. 406 limits an attorney's total fee allowance to twenty-five percent of the past due benefits recovered by the

claimant regardless of the fact that the attorney represented the claimant before both the Secretary and the District Court." 425 F.2d at 1192. The parties' contention that *Dawson* "did not hold that the total 406(a) fees and 406(b) fees awarded cannot ever exceed twenty-five percent of the claimant's past due benefits" is rejected. As is clear, that is exactly what the *Dawson* court held.

Nor is this Court alone in that observation. As Judge Conway has noted:

> No matter what statute or combination of statutes an attorney uses to obtain fees after a successful Social Security appeal, binding Eleventh Circuit precedent caps the aggregate amount of attorney's fees at 25 percent of the past-due benefits awarded to the claimant. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970).

Carbonell v. Comm'r of Soc. Sec., No. 6:11-CV-400-ORL-22, 2015 WL 631375, at *1 (M.D. Fla. Feb. 13, 2015).[5] The Eleventh Circuit has relied upon and applied *Dawson* in both published and unpublished opinions. *See, e.g., Paltan*, 518 F. App'x 673; *Bookman*, 490 F. App'x 314; *Green v. Comm'r of Soc. Sec.*, 390 F. App'x 873 (11th Cir. 2010);[6] *Bergen v. Comm'r of Soc.*

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[5]Judge Dalton has also affirmed this interpretation, and *Dawson's* status as controlling and binding precedent. *Bibber, supra.*

[6]Of particular note, contrary to its position in this case, in *Green*, the Commissioner argued "that the district court erred in calculating Green's §406(b) fee by failing to include in its calculus the $5,300.00 already paid to Green's administrative attorney

Sec., 454 F.3d 1273 (11th Cir. 2006); *Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir. 1988). In doing so, the Eleventh Circuit has rejected the contention that *Dawson* – and its prohibition against aggregate fees over 25% of past-due benefits – is anything other than binding precedent. *Paltan*.

— ***Paltan* and *Bookman* are persuasive**

The parties next contend that *Paltan* and *Bookman* are unpersuasive as they are unpublished and, in the case of *Paltan*, "actually conflict" with *Dawson* and *Jackson*.

In *Paltan*, a per curiam opinion, the Eleventh Circuit affirmed the decision of this Court, holding that "[t]he district court did not err in its attorney's fees calculation." 518 F. App'x at 674. The *Paltan* opinion discusses both *Dawson* and *Jackson*, and directly addresses the issues raised in the instant case and related cases:

> George Paltan appeals the district court's [] award of attorney's fees under 42 U.S.C. § 406(b) to Richard Culbertson, his attorney before the district court in a challenge to the Social Security Administration's denial of his application for disability insurance benefits and supplemental security income. On appeal, Paltan argues the district court erred by awarding Culbertson attorney's fees in the amount of $182.91, rather than $4,281.83. He

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under §406(a) . . ." 390 Fed. Appx. 873, n. 1. The Eleventh Circuit did not reach that argument "because the Commissioner failed to file a cross-appeal raising the issue." *Id.*

maintains the district court erroneously concluded that the total amount of attorney's fees recoverable under 42 U.S.C.§ 406(a), § 406(b), and the Equal Access to Justice Act (EAJA), 28 U.S.C.§ 2412(d), could not exceed 25% of Paltan's past-due benefits.

The district court did not err in its attorney's fees calculation.[] Paltan was represented in his proceedings before the Social Security Administration by J. Michael Matthews. After the Commissioner of Social Security denied Paltan's application for benefits, Paltan, represented by Culbertson, successfully appealed to the district court. Following the district court's remand, the Social Security Administration awarded Paltan $38,327.35 in past-due benefits. Accordingly, Matthews and Culbertson could receive, in the aggregate, 25% of those past-due benefits as attorney's fees, or $9,581.83. *See Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970) (holding that 42 U.S.C.§ 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant.").[] Because Matthews received $5,300.00 in attorney's fees pursuant to 42 U.S.C.§ 406(a) for his work before the Social Security Administration, Culbertson was entitled only to $4,281.83 under § 406(b) for his work before the district court--i.e., the remainder of the $9,581.83 of past-due benefits available for attorney's fees. *See Dawson*, 425 F.2d at 1195.

Culbertson, however, previously obtained an attorney's fees award of $4,098.92 under the EAJA for the work he did before the district court. As such, the "Savings Provision" of the EAJA required Culbertson to refund either the EAJA award or the § 406(b) award, whichever was smaller. 28 U.S.C. § 2412, note; Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985); *see also Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271-72 (11th Cir. 2010). Because the $4,098.92 EAJA award was smaller than the § 406(b) award of $4,281.83, Culbertson was required to refund the EAJA award to Paltan. Culbertson had the option of either refunding the EAJA award to Paltan directly, or reducing his § 406(b) award by $4,098.92, leaving him with a § 406(b) award of $182.91, the figure calculated by the district court.[] *See Jackson*, 601 F.3d at 1274 (explaining that an attorney who receives fees under both the EAJA and § 406(b) "may choose to effectuate the refund by deducting the amount of an earlier EAJA award from his subsequent 42 U.S.C. § 406(b) fee request").

In performing this calculus, the district court did not create a new rule limiting attorney's fees awards under § 406(a), § 406(b), and the EAJA to 25% of a claimant's past-due benefits. Instead, the district court followed binding Circuit precedent in imposing a 25% cap on attorney's fees under § 406(a) and (b) in the aggregate. The court, moreover, did not err by refusing to allow Culbertson to offset his EAJA award by deducting it from the total of Paltan's

> past-due benefits, which included the § 406(a) award to Matthews, or by prohibiting Culbertson from receiving double payment under the EAJA and § 406(b) for representing Paltan before the district court. *See id.* at 1272 ("We have previously recognized that the Savings Provision was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)."). Accordingly, we affirm the district court's award of attorney's fees.

Paltan, 518 F. App'x 673, 673-75 (11th Cir. 2013) (emphasis added and footnotes omitted). Against this clear language, the parties' contention that "[t]he affirmation of the district court fee order in *Paltan* does not establish that the Court agreed with the analysis, but only that the amount was within the discretion of the district court" (Doc. 30, p. 9) is without merit. The parties present no reason for disregarding *Paltan* here.

Similarly, in *Bookman*, the Eleventh Circuit affirmed the undersigned's order with respect to attorney's fees under §40(b) and EAJA. The appellate court explained:

> If a party filing for disability benefits receives a favorable determination before the SSA, the Commissioner is required to fix a reasonable fee to compensate her attorney, but that award may not exceed 25% of the claimant's past-due benefits. 42 U.S.C. § 406(a). Similarly, if a party filing for disability benefits receives a favorable judgment from a court, the court may fix a reasonable fee to compensate her attorney, but

> that award also may not exceed 25% of the claimant's past due benefits. *Id.* § 406(b). And the aggregate of the attorney's fees awarded under § 406(a) and § 406(b) may not exceed 25% of the claimant's past due benefits. *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir.1970).[] Awards under § 406 are paid "by the claimant out of the past-due benefits awarded." *Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1271 (11th Cir. 2010).
>
> In this case, the district court did not abuse its discretion because it was not authorized to award additional attorney's fees under § 406(b). The SSA had already awarded 25% of Bookman's past-due benefits to her attorney under § 406(a), and any additional award under § 406(b) would have resulted in an aggregate award that exceeded the maximum allowable under § 406. *See id.*

Bookman v. Comm'r of Soc. Sec., 490 F. App'x 314, 316 (11th Cir. 2012) (footnote omitted).[7] Although not published, the parties point to nothing to dilute *Bookman's* persuasive value, as it is consistent with *Dawson* and its progeny.

— The Court declines to follow *White*

To the extent the parties urge the Court to follow *White v. Comm'r of Soc. Sec.*, 2012 WL 1900562 (M.D.

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[7]Note that *Bookman* looked to the §406(a) award as a basis for concluding that the district court was not authorized to award additional fees under §406(b). Without knowledge of the §406(a) fees already awarded, the Court cannot ascertain the limits of its authority under the statute.

Fla. May 2, 2012) (adopted and confirmed by *White v. Comm'r of Soc. Sec.*, 2012 1890558 (M.D. Fla. May 24, 2012)), this Court has already addressed and distinguished *White* in *Paltan*, and that case has been affirmed. *See Paltan*, Case No. 07-cv-932-DAB (Doc. 37). The parties present no compelling reason to find *White* persuasive here.

Although it is not discussed at length in the Response, the Court assumes the parties are relying on *White* for its finding that, "[i]n determining an appropriate Section 406(b) fee, the Court should not include any fees awarded under the EAJA as part of Section 406(b)'s statutory cap." *White*, 2012 WL 1900562, at *6.[8] As support for this conclusion, Judge Kelly quoted and relied upon *Watford v. Heckler*, 765 F. 2d 1562 (11th Cir. 1985). *Id.* At issue in *Watford*, however, was not, as here, the appropriate calculation of the §406(b) fee, but whether §406(b) limits or prohibits an award of attorney's fees *"against the government"* under the *EAJA*. As explained by that court:

> Therefore, the question becomes this: does Section 406(b) of the Social Security Act directly or indirectly place a ceiling on the *amount* of attorneys' fees that may be awarded against the government (pursuant to the EAJA) in Social Security cases? In view of the purposes and legislative histories of the two acts, as well as their express language, the answer would seem to be no. As already noted, the express language of Section 406(b) makes no reference to any

[8]The parties cite no other case which follows *White* with respect to this conclusion.

> limitation on the amount of fees to be awarded *against the government* in a proper case. Nor can any limit be gleaned from the express purposes of the two acts. The purpose of the EAJA was to alleviate economic deterrents to contesting unreasonable government action by shifting the burden of attorneys' fees from the private litigant to the government where the government's position is substantially unjustified. See H.R.Rep. No. 96-1418, 96th Cong.2d Sess. (1980), reprinted in 1980 U.S.Code Cong. & Ad.News 4984. The purposes of 42 U.S.C. § 406(b), on the other hand, were (1) to limit the size of contingency fees payable by the client, Congress believing that contingent fee arrangements in Social Security cases often resulted in an inordinate deprivation of benefits otherwise payable to the client, and (2) to ensure that attorneys would receive some fees for their representation. See S.Rep. No. 404, Cong., 1st Sess. 422 (1965), reprinted in 1965 U.S.Code Cong. & Ad.News 1943, 2062. *See also Guthrie v. Schweiker*, 718 F.2d at 107, n. 9; *Watkins v. Harris*, 566 F.Supp. at 495-96; *Ocasio v. Schweiker*, 540 F.Supp. at 1322. Consequently, allowing fee awards *against the government* in Social Security cases in amounts greater than 25 percent of a claimant's past-due benefits would not be contrary to the letter or the spirit of 42 U.S.C. § 406(b).

Watford v. Heckler, 765 F.2d 1562, 1566-67 (11th Cir. 1985) (emphasis original). Here, the EAJA award has already been formulated without any reference to the

§406(b) cap. More importantly, that issue has nothing to do with how the courts are to treat EAJA fees *already awarded* in calculating an appropriate §406(b) fee. Indeed, the *Watford* court acknowledged as much, noting: "Of course, no 'double recovery' is permitted, and any award received by the claimant's counsel under the EAJA for work done in court must be used to reimburse the claimant up to any amount previously awarded under 42 U.S.C.§ 406(b)(1) for counsel's services in court." *Id., n. 5.*

The Supreme Court discussed the role of the EAJA in the social security fee context, at length, in *Gisbrecht v. Barnhart*, 535 U.S. 789, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002). The Court stated:

> In many cases, as in the instant case, the Equal Access to Justice Act (EAJA), enacted in 1980, effectively increases the portion of past-due benefits the successful Social Security claimant may pocket. 94 Stat. 2329, *as amended*, 28 U.S.C. § 2412. Under EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees payable by the United States if the Government's position in the litigation was not "substantially justified." § 2412(d)(1)(A). EAJA fees are determined not by a percent of the amount recovered, but by the "time expended" and the attorney's "[hourly] rate," § 2412(d)(1)(B), capped in the mine run of cases at $125 per hour, § 2412(d)(2)(A). ... Cf. 5 U.S.C.§ 504 (authorizing payment of attorney's fees by the Government when a party prevails in a federal agency adjudication).Congress

> harmonized fees payable by the Government under EAJA with fees payable under § 406(b) out of the claimant's past-due Social Security benefits in this manner: Fee awards may be made under both prescriptions, but the claimant's attorney must "refun[d] to the claimant the amount of the smaller fee." Act of Aug. 5, 1985, Pub.L. 99-80, § 3, 99 Stat. 186. "Thus, *an EAJA award offsets an award under Section 406(b)*, so that the [amount of the total past-due benefits the claimant actually receives] will be increased by the ... EAJA award up to the point the claimant receives 100 percent of the past-due benefits." Brief for United States 3.

Gisbrecht, 535 U.S. at 796, 122 S. Ct. at 1822 (emphasis added, footnote omitted). *See also Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1277 (11th Cir. 2006), quoting *Gisbrecht*.

Under the dictates of *Jackson*, the claimant is entitled to the full benefit of the EAJA award unless the EAJA award exceeds the §406(b) fee. In cases where the funds withheld by the Commissioner are sufficient to cover the §406(b) fee, counsel has the option of refunding the EAJA award to the claimant or reducing the §406(b) fee by the same amount. 601 F.3d at 1271. In cases where the withheld funds are insufficient to pay the entire approved §406(b) fee, counsel may collect only so much of the withheld funds as leaves the claimant with the full EAJA award -- again, unless the EAJA award exceeds the available §406(b) funds. Thus, regardless of whether it is offset by refund directly to the claimant, or retained by

counsel and deducted from the §406(b) request, the EAJA award cannot be ignored and must be accounted for in the §406(b) calculation.[9]

Stated differently, the methodology approved by the Eleventh Circuit in *Paltan* still applies. Counsel cannot sequence the various sources of payments and credits to avoid the dictates of the statutes and case law. To the extent the parties rely on *White* to conclude otherwise, they are mistaken.

IV. Going Forward

The Court ends the analysis where it began and concludes that the statutory framework and binding case law in this circuit compels the rejection of the parties' suggested language. To the extent the parties object to the language prohibiting counsel from seeking additional §406(a) fees after obtaining full relief from this Court, the Court can deny all applications that do not provide complete information regarding the status of §406(a) fees, as premature. Alternatively, and in view of counsel's difficulties in obtaining accurate and timely §406(a) information from the Commissioner, the Court can award §406(b) fees conditionally, to wit:

> This court approves *up to* $XXXX in 406(b) fees in this matter, provided the maximum amount of 406(b) fees authorized combined with 1) the total amount of 406(a) fees authorized by the Commissioner and 2) the amount of any EAJA award that has not been refunded to the

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[9]This is not to say that the Court must order the refund or oversee payment. *Jackson* makes clear that it is counsel's obligation under penalty of law to effectuate the offset.

> claimant shall not exceed twenty-five percent of the total past-due benefits payable to Plaintiff.

This language adheres to the statutory standard and places the responsibility for compliance with *Dawson* and *Jackson* on the parties and counsel.

The instant motion

The premise of Defendant's motion is its assertion that "the Order appears to direct the Commissioner not to award counsel §406(a) fees, should Plaintiff's counsel seek them," citing page 5 of the Order. The Order does no such thing. Rather, the Order explains the controlling law in this circuit and grants counsel's motion, "**provided that counsel** is barred from any further request for fees in this matter, pursuant to § 406(a) or otherwise, and counsel for both parties are directed to advise the agency of this preclusion as part of the Court's award." (Doc. 26, at 5-emphasis original). The Court did not purport to direct the Commissioner to take - or not take - any action.

Here, **counsel** was seeking a §406(b) fee which, coupled with retention of the EAJA fee already awarded, equaled the full 25%, leaving no additional funds available to award under §406(a), without running afoul of the cap. As the motion for §406(b) fees was filed before any petition for an award of fees under §406(a) was presented to the Commissioner, and the motion was not opposed by the Commissioner as being premature or otherwise, the Court granted the amount sought, which had the legal effect of foreclosing any additional award under §406. To the extent the Commissioner now asserts that "this court is not the correct forum to determine whether the payment of 406(a) fees is appropriate," the Court reiterates that it

has no such plans. Should the Commissioner see it differently, she may object to future §406(b) motions as premature, if they fail to present without either 1) evidence of a §406(a) award or 2) a signed waiver of §406(a) fees by all counsel at the administrative level. Alternatively, the Court can condition its §406(b) award, as set forth above. In any event, the instant motion presents no sufficient ground for relief from the November 17, 2015 Order. It is therefore **denied.**

DONE and **ORDERED** in Orlando, Florida on April 19, 2016.

/s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Relevant Statutory Provisions

§ 406. Representation of claimants before Commissioner

(a) Recognition of representatives; fees for representation before Commissioner of Social Security

(1) The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security. Notwithstanding the preceding sentences, the Commissioner, after due notice and opportunity for hearing, (A) may refuse to recognize as a representative, and may disqualify a representative already recognized, any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or

appearing before any Federal program or agency, and (B) may refuse to recognize, and may disqualify, as a non-attorney representative any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice. A representative who has been disqualified or suspended pursuant to this section from appearing before the Social Security Administration as a result of collecting or receiving a fee in excess of the amount authorized shall be barred from appearing before the Social Security Administration as a representative until full restitution is made to the claimant and, thereafter, may be considered for reinstatement only under such rules as the Commissioner may prescribe. The Commissioner of Social Security may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant

to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if--

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of--

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant,

then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance

amounts under section 415(i) of this title since such date.

* * *

(C) In any case involving--

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter {Supplemental Security Income for the Aged, Blind, and Disabled], and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims,

the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of--

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D)--

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be

conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d) of this section, if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall * * * certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined

before any applicable reduction under section 1320a-6(a) of this title).

* * *

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

* * *

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

No. 17-773

In the Supreme Court of the United States

RICHARD A. CULBERTSON,

Petitioner,

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed November 21, 2017
Certiorari Granted May 21, 2018

RICHARD A. CULBERTSON*
SARAH FAY*
Law Offices of Richard A. Culbertson
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Orlando, FL 32803
(407) 894-0888

* *Additional Counsel for Petitioner*

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The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated June 26, 2017 ..... 1a

Order of the U.S. District Court for the Middle District of Florida, dated December 17, 2015 ..... 18a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13664

Katrina F. Wood, Plaintiff-Appellant,

v.

Commissioner of Social Security, Defendant-Appellee.

Date Filed	Docket Text
06/17/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Katrina F. Wood on 06/16/2016. Fee Status: IFP Granted. * * *
* * *	
07/05/2016	APPEARANCE of Counsel Form filed by Richard Allen Culbertson for Katrina F. Wood. * * *
07/05/2016	Civil Appeal Statement filed by Attorney Richard Allen Culbertson for Appellant Katrina F. Wood. * * *
* * *	
07/25/2016	*MOTION to consolidate appeals 16-13664, 16-13665, 16-13666, and 16-14004 filed by Commissioner of Social Security. Motion is Unopposed.* * * *
* * *	

08/25/2016	ORDER: Appellee's motion to consolidate appeals is GRANTED. [7862315-2] in 16-13664, [7862321-2] in 16-13665, [7862326-2] in 16-13666, [7863278-2] in 16-14004 * * *
* * *	
09/30/2016	Appellant's brief filed by Katrina F. Wood. * * *
09/30/2016	Appendix filed [1 VOLUMES] by Appellant Katrina F. Wood. * * *
09/30/2016	Added Attorney(s) Sarah Patience Fay for party(s) Appellant Katrina F. Wood, in case 16-13664.
09/30/2016	Corrections to appendix (Tabs were added to appendix) received on 10/19/2016 from Appellant Katrina F. Wood in 16-13664[.] * * * All deficiencies have been corrected. * * *
* * *	
10/31/2016	Appellee's Brief filed by Appellee Commisioner of Social Security. * * *
* * *	
11/7/2016	Supplemental Appendix [1 VOLUMES] filed by Appellee Commissioner of Social Security. * * *
* * *	
11/14/2016	* * * Reply Brief filed by Appellant Katrina F. Wood. * * *
* * *	
11/29/2016	Corrected Reply Brief filed by Appellant Katrina F. Wood. * * *
* * *	

04/07/2017	Oral argument scheduled. Argument Date: Wednesday, 05/17/2017 Argument Location: Atlanta. * * *
05/17/2017	Oral argument held. Oral Argument participants were Richard Allen Culbertson for Appellant Katrina F. Wood and Rebecca Ringham for Appellee Commissioner of Social Security in 16-13664. * * *
06/26/2017	Opinion issued by court as to Appellant Katrina F. Wood in 16-13664[.] * * * Opinion type: Published. Opinion method: Signed. * * *
06/26/2017	Judgment entered as to Appellee Commissioner of Social Security in 16-13664[.] * * *
08/23/2017	Mandate issued as to Appellant Katrina F. Wood in 16-13664[.] * * *
* * *	

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA (ORLANDO)

No. 16:12-cv-00915-DAB

Katrina F. Wood, Plaintiff,

v.

Commissioner of Social Security, Defendant.

Date Filed	#	Docket Text
06/18/2012	1	COMPLAINT against Commissioner of Social Security filed by Katrina F. Wood. * * *
		* * *
08/30/2012	13	ANSWER to 1 Complaint, filed by Commissioner of Social Security. * * *
		* * *
09/20/2012	19	MEMORANDUM in opposition to the Commissioner's decision filed by Katrina F. Wood. * * *
12/12/2012	20	MEMORANDUM in support of the Commissioner's decision filed by Commissioner of Social Security. * * *
09/16/2013	21	MEMORANDUM OPINION AND ORDER. The Court REVERSES and REMANDS the

		Commissioner of Social Security's decision pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk is directed to enter judgment and to close the file. * * *
09/20/2013	22	JUDGMENT that the decision of the Commissioner is reversed and this case is remanded to the Social Security Administration for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g). * * *
11/12/2013	23	Unopposed MOTION for Attorney Fees by Katrina F. Wood. * * *
11/21/2013	24	ORDER granting 23 Motion for Attorney Fees. The Clerk is DIRECTED to enter judgment in the amount of $4,107.27 for attorney's fees. * * *
11/21/2013	25	JUDGMENT on attorney fees. Fees awarded to Katrina F. Wood against Commissioner of Social Security[.] * * *
03/16/2016	26	MOTION for Attorney Fees *Request for Authorization to Charge a Reasonable Fee* by Katrina F. Wood. (Attachments: # 1 Appendix 1, # 2 Appendix 2, # 3 Appendix 3, # 4 Appendix 4)(Culbertson, Richard)[.] * * *

03/29/2016	27	RESPONSE to Motion re 26 MOTION for Attorney Fees *Request for Authorization to Charge a Reasonable Fee* filed by Commissioner of Social Security. * * *
04/20/2016	28	**ORDER granting in part 26 Motion for Attorney Fees. The Court finds that the sum sought is reasonable and an award of $1,623.48 is appropriate under § 406(b).** * * *
06/16/2016	29	NOTICE OF APPEAL as to 28 Order on Motion for Attorney Fees by Katrina F. Wood. * * *
* * *		
06/27/2017	33	OPINION/ORDER of USCA as to 29 Notice of appeal filed by Katrina F. Wood. EOD: 6/26/2017; Mandate to issue at a later date. USCA number: 16-13664-GG. District Court's decision * * * is AFFIRMED. * * *
08/24/2017	34	MANDATE of USCA as to 29 Notice of appeal filed by Katrina F. Wood. Issued as Mandate: 8/23/207. USCA number: 16-13664-GG; re 33 Opinion. AFFIRMED. * * *
* * *		

RICHARD A. CULBERTSON
Attorney At Law
3200 CORRINE DRIVE
ORLANDO, FLORIDA 32803
Office: (407) 894-0888 ***Fax: (407) 898-2737***

RETAINER AGREEMENT - FEDERAL COURT APPEAL

Claimaint, **Katrina F. Wood**, hereby retains Richard A. Culbertson (hereafter referred to as attorney), to file an appeal of a claim for benefits under the Social Security Act in the United States District Court for the Middle District of Florida.

If the court renders a judgment reversing or remanding the administrative decision denying benefits and claimant is ultimately awarded past due benefits, claimant agrees to pay a fee of 25 percent of the total of the past-due benefits to which the claimant is entitled. We understand that past-due benefits are the total amount of money to which claimant and any auxiliary beneficiary(ies) become entitled through the month before the month in which the Social Security Administration effectuates a favorable determination or decision on the claim. Social Security Benefits and Supplemental Security Income benefits are included. The Commissioner of Social Security may certify the amount of any fee allowed by the court for payment to attorney out of the amount of such past-due benefits.

It is understood that this agreement shall in no way limit the amount of attorneys fees which may be awarded under the Equal Access to Justice Act (EAJA). If, within attorney's sole discretion, a claim for fees under EAJA is justified, then he shall file a claim for said fees against the government in the Federal Court. Any attorneys fees awarded by the court that are paid by the government and retained by Richard A. Culbertson will be applied to reduce the amount of attorneys fees that would otherwise be due from claimant's past-due benefits. If the amount paid by the government exceeds 25 percent of claimant's past due benefits, then no amount will be due for attorneys fees. If the amount paid by the government is less than 25 percent of claimant's past due benefits, then the difference will be due as agreed to above. Claimant hereby assigns his right to any attorney fees awarded under the Equal Access to Justice Act to attorney, Richard A. Culbertson. It is agreed that Richard A. Culbertson will pay any amounts due to any other attorney who works on claimant's case. Claimant agrees that all attorney fees awarded by the court will be paid directly to Richard A. Culbertson. Any fees paid to other attorneys will not reduce the amount due to Richard A. Culbertson under this agreement.

This agreement applies to attorney's representation of claimant in Federal Court. It does not cover or include any representation before the Social Security Administration.

We have both received signed copies of this agreement.

Agreed to at Orlando, Florida on this 6th day of June, 2012.

Claimant:
Katrina F. Wood
SSN: [redacted]

Richard A. Culbertson,
Attorney
3200 Corrine Drive,
Orlando, FL 32803
(407) 894-0888
Florida Bar No. 876577

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATRINA F. WOOD,

Plaintiff,

v. **Case No: 6:12-cv-915-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the Commission is reversed and this case is remanded to the Social Security Administration for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Date: September 20, 2013

SHERYL L. LOESCH, CLERK

s/M. Pleicones, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATRINA F. WOOD,

Plaintiff,

-vs- **Case No: 6:12-cv-915-Orl-DAB**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: PLAINTIFF'S UNCONTESTED PETITION FOR ATTORNEY'S FEES (Doc. No. 23)

FILED: November 12, 2013

THEREON it is **ORDERED** that the motion is **GRANTED**.

Plaintiff's application for fees follows the issuance of an Order and entry of Judgment reversing the decision of the Commissioner of Social Security with respect to Plaintiff's claim for benefits, and remanding the case pursuant to sentence four of 42 U.S.C. § 405(g) (Docs. 21 & 22).

Pursuant to the Equal Access to Justice Act, a party can recover an award of attorney's fees against the government provided that the party seeking the award is the prevailing party; the application for such fees, including an itemized justification for the amount sought, is timely filed; the position of the government is not substantially justified; and no special circumstances are present which would make an award unjust. Title 28 U.S.C. § 2412(d)(1)(A).

Plaintiff's Motion seeks an award of attorney's fees in the amount of $4,107.27, calculated at the rate of $184 per hour for 20.7 hours of work expended in 2012 and $186.55 per hour for 1.6 hours of work in 2013 (factoring in the statutory rate of $125.00 per hour adjusted for cost of living increase of 47% and 49% respectively) (based on the applicable Consumer Price Index). Doc. 23. *See, Meyer v. Sullivan*, 958 F.2d 1029, 1034 (11th Cir. 1992) (court must consider cost of living increases when awarding attorney fees under Equal Access to Justice Act); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990) (CPI is appropriate proof of cost of living increase and justifies higher award than statutory rate). The Commissioner is not opposed to the hours or rate sought. *See*, Doc. 23 at 3.

Counsel also states that Plaintiff has assigned her fees to counsel. The parties have agreed that after the Court issues an order awarding EAJA fees to Plaintiff the Commissioner will determine whether Plaintiff owes a debt to the government, and if the U.S. Department of the Treasury determines that Plaintiff does not owe a federal debt, the government will accept Plaintiff's assignment of EAJA fees and pay fees directly to Plaintiff's counsel. Doc. 23 at 2.

Any arrangement between client and counsel is outside the purview of the judgment. Moreover, under Supreme Court precedent directly on point, *Astrue v. Ratliff*, 130 S. Ct. 2521, 2523 (June 14, 2010), EAJA attorney fees are awarded to the prevailing party, not to the prevailing party's attorney. *See, Martin v. Astrue*, Case No. 3:08-cv-1013-J-TEM, 2010 WL 2639566, *2 (M.D. Fla. June 29, 2010) (observing that "*Ratliff* acknowledges that historically the actual payment of EAJA fees is often directed to the attorney for the prevailing party, and sets forth that such practice will in fact continue where the prevailing plaintiff does not owe a debt to the government and assigns the right to receive the fees to the attorney"); *Whittemore v. Astrue*, No. 3:09-cv-1242-J-25MCR, 2011 WL 2144590, at *2 (M.D. Fla. May 31, 2011) (stating that the Supreme Court in *Astrue v. Ratliff*, the Supreme Court "implicitly approved the practice of issuing EAJA payments directly to a plaintiff's attorney only in cases where the plaintiff does not owe a debt to the Government and the plaintiff has assigned the right to the EAJA fees to the attorney").

Upon review of the supporting papers filed by Plaintiff and the Commissioner's lack of objection, the Court finds that an award of $4,107.27 is appropriate under the EAJA. The Clerk is **DIRECTED** to enter judgment in the amount of **$4,107.27** for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. Section 2412(d).

DONE and **ORDERED** in Orlando, Florida on November 20, 2013.

/s/
DAVID A. BAKER

UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record

M7

Social Security Administration
Retirement, Survivors, and Disability Insurance
Notice of Award

Office of Central Operations
1500 Woodlawn Drive
Baltimore, Maryland 21241-1500
Date: June 4, 2015
Claim Number: [redacted] HA

KATRINA F WOOD
[redacted]
DAYTONA BEACH FL 32114

We are writing to let you know that you are entitled to monthly disability benefits from Social Security beginning February 2012.

Your Benefits

The following chart shows your benefit amount(s) before any deductions or rounding. The amount you actually receive may differ from your full benefit amount. When we figure how much to pay you, we must deduct certain amounts, such as Medicare premiums and worker's compensation offset. We must also round down to the nearest dollar.

Beginning Date	Benefit Amount	Reason
February 2012	$ 775.20	Entitlement began
December 2012	$ 788.30	Cost of living adjustment
December 2013	$ 800.10	Cost of living adjustment
December 2014	$ 813.70	Cost of living adjustment

What We Will Pay

- Your first check is for $603.10.
- This is the money you are due through June 2015.
- After that, you will receive $708.00 on or about the fourth Wednesday of each month.

We are withholding your Social Security benefits for February 2012 through May 2015. We may have to reduce these benefits if you received Supplemental Security Income (SSI) for this period. When we decide whether or not we will have to reduce your Social Security benefits, we will send you another letter. We will pay you any Social Security benefits you are due for this period.

The Date You Became Disabled

You have to be disabled for 5 full calendar months in a row before you can be entitled to benefits. Your first month of entitlement is February 2012.

Information About Medicare

We did not give you earlier medical insurance because we did not process it timely. If you want to have these benefits earlier, you can choose medical insurance benefits beginning February 2014. If you want this benefit to start earlier, you must do the following things within 60 days after the date of this notice:

- tell us in writing that you want the medical insurance benefits beginning February 2014;
- pay us $1,678.40 (this covers the premiums due from February 2014 through May 2015); or,
- tell us we can withhold this amount from the check.

If you want the benefits beginning February 2014 but find it hard to pay the premium amount in a lump sum, ask us about other ways to pay the money.

We have changed the date of your entitlement to hospital and medical insurance under Medicare. Your new entitlement date is February 2014. We will take any premiums due for the insurance out of your next payment.

We have changed the date of your entitlement to hospital insurance under Medicare. Your new entitlement date is February 2014.

We will reduce the payment you will receive shortly after July 22, 2015 by $104.90 because of medical insurance premiums. When we figured the amount of your payment, we took into account all the medical insurance premiums which were previously paid or still due. We will deduct medical insurance premiums 1 month in advance.

We are deducting past-due premiums from your check.

Information About Representative's Fees

Your past-due benefits are $30,871.00 for February 2011 through April 2015. Under the fee agreement, the lawyer cannot charge you more than $7,717.75 for his or her work. The amount of the fee does not include any out-of-pocket expenses (for example, costs to get copies of doctors' or hospitals' reports). This is a matter between you and the lawyer.

When a representative wants to charge for helping with a Social Security claim, we must first approve the fee. We usually withhold 25 percent of past due benefits in order to pay the approved representative's fee. We withheld $7,717.75 from your past due benefits in case we need to pay your representative.

- If all the work on this case for you and your family is finished, and your representative wants to charge a fee, a request to have it

approved should be sent to us right away.

- If all work is not finished in this case, the representative should let us know that a fee will be charged. This must be done within 60 days of the date of this letter.

- If the representative will not charge a fee, a statement saying so, signed and dated by the representative, should be sent to us instead.

When the amount of the fee is decided, we will let you and the representative know how much of this money will be used to pay the fee. We will send any remainder to you. If the approved fee is more than the money we have withheld, the Social Security Administration is not involved in paying the rest of the fee.

Send any fee petition to:

Office of Disability Adjudication and Review
SSA Hearing Office, Desoto Bldg, Suite 400
8880 Freedom Xing Trl
Jacksonville, FL 32256

Section 206 (B) of the Social Security Act, as amended, governs fees for services before the Court. If your lawyer wishes to receive a fee for those services, he must send the petition for that fee to the court that rendered the decision with a copy to the United States Attorney s [sic] Office. He should also send a copy to the Social Security Administration at:

SSA, ODO, DDO 1, SAES
P.O. Box 32913
Baltimore, Md. 212412913

Your lawyer may also petition for a fee under the Equal Access to Justice Act (EAJA). These awards are paid from administrative funds and, unlike fees under Section 206 of the Act, are not deducted from your past-due benefits. The EAJA specifically provides that where an attorney receives fees for the same work under both Section 206(B) of the Social Security Act and the EAJA, the attorney must refund to you the amount of the smaller fee. If your lawyer is not going to file a fee petition with the Court, he should notify us in writing so that we can send you and your family any funds we withheld from your past-due benefits.

Other Social Security Benefits

This benefit is the only benefit you can receive from us at this time. In the future, if you think you might qualify for another benefit from us, you will need to apply again.

Your Responsibilities

The decisions we made on your claim are based on information you gave us. If this information changes, it could affect your benefits. For this reason, it is important that you report changes to us right away. We have enclosed a pamphlet, "What You Need To Know When You Get Social Security Disability Benefits". It will tell you what must be reported and how to report.

Be sure to read the parts of the pamphlet which explain what to do if you go to work or if your health improves.

Things To Remember

Doctors and other trained staff decided that you are disabled under our rules. But, this decision must be reviewed at least once every 3 years. We will send you a letter before we start the review. Based on that review, your benefits will continue if you are still disabled, but will end if you are no longer disabled.

Do You Think We Are Wrong?

You are entitled to benefits because of a decision made by the Administrative Law Judge.

If you disagree with this decision, you have the right to appeal. We will review your case and consider any new facts you have. A person who did not make the first decision will decide your case. We will correct any mistakes. We will review those parts of the decision, which you believe are wrong and will look at any new facts you have. We may also review those parts, which you believe are correct and may make them unfavorable or less favorable to you.

- You have 60 days to ask for an appeal.
- The 60 days start the day after you get this letter. We assume you got this letter 5 days after the date on it unless you show us that you did

not get it within the 5-day period.

- You will have to have a good reason for waiting more than 60 days to ask for an appeal.

- You have to ask for an appeal in writing. We will ask you to sign a form SSA-561-U2, called "Request for Reconsideration". Contact one of our offices if you want help.

Suspect Social Security Fraud?

Please visit http://oig.ssa.gov/r or call the Inspector General's Fraud Hotline at 1-800-269-0271 (TTY 1-866-501-2101).

If You Have Questions

We invite you to visit our website at www.socialsecurity.gov on the Internet to find general information about Social Security. If you have any specific questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-866-217-0721. We can answer most questions over the phone. If you are deaf or hard of hearing, you may call our TTY number, 1-800-325-0778. You can also write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
4990 S CLYDE MORRIS
PORT ORANGE, FL 32127

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

Social Security Administration

Enclosure(s):
SSA Pub No 05-10153

SOCIAL SECURITY ADMINISTRATION

Refer To: [redacted]
Katrina F. Wood

Office of Disability Adjudication
and Review
8880 Freedom Xing Trl
Jacksonville, FL 32256-1224
Tel: (866)931-0124
Fax: (904)232-3961

July 20, 2015

AUTHORIZATION TO CHARGE AND COLLECT FEE

To: Richard A. Culbertson
3200 Corrine Drive
Orlando, FL 32803

IN THE CASE OF	CLAIM FOR
Katrina F. Wood (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[redacted] (Social Security Number)

You are authorized to charge and collect a fee in the amount of $2865.00 for services provided to the claimant and auxiliaries, if any, for proceedings before the Social Security Administration. The amount of the fee does not include any out-of-pocket expenses (for example, costs to get copies of doctors' or hospitals' reports). This is a matter between you and the claimant. It should be noted that travel time is not included, hearing was 1.5 hours with client present by video. Also, activity prior to federal remand was included in federal court payment and is not counted here.

If you or the claimant disagrees with the authorized fee, either or both can ask us to review the amount of the fee. If the claimant thinks the fee is too high or you think the fee is too low, either party must write to us **within 30 days from the date of this notice**. You or the claimant must also send a copy of the request to the other person. The review can result in an increase, decrease, or no change in the amount of the fee. The request for review must give the reasons for disagreeing with the amount of the fee and be sent to:

Office of the Regional Chief Administrative Law Judge
Office of Disability Adjudication and Review
SSA ODAR
61 Forsyth Street SW
Suite 20T10
Atlanta, GA 30303

The paragraph(s) below refers to payment of the representative's authorized fee.

We will directly pay your fee from the claimant's Title II or Title XVI past-due benefits, or both. (If the check does not cover the authorized fee, payment of the balance is a matter for you and the claimant to settle.) Awe will also charge you the assessment required by sections 206(d) or 1631(d)(2)(C) of the Social Security Act. You cannot charge or collect this expense from the claimant. You should send any questions about the status of the check to the processing center or Social Security office that issued the claimant's award letter.

AUTHORIZING OFFICIAL

Teresa J. McGarry
Administrative Law Judge

SEE ATTACHMENTS FOR OTHER IMPORTANT INFORMATION

cc: Katrina F. Wood
[redacted]
Daytona Beach, FL 32114

[TOP OF PAGE TRUNCATED]

1500 Woodlawn Drive
Baltimore, Maryland 21241-1500
Date: February 15, 2016
Claim Number: [redacted] HC1

KATRINA WOOD
FOR
[redacted]

DAYTONA BEACH FL 32114-7341

We are writing to let you know that [redacted] is entitled to monthly child's benefits from Social Security beginning February 2012.

Your Benefits

The following chart shows [redacted]'s benefit amount(s) before any deductions or rounding. The amount she actually receives may differ from her full benefit amount. When we figure how much to pay her, we must deduct certain amounts, such as Medicare premiums and worker's compensation offset. We must also round down to the nearest dollar.

Beginning Date	Benefit Amount	Reason
February 2012	$ 88.60	Entitlement began
December 2012	$ 90.10	Cost of living adjustment

December 2013	$ 91.40	Cost of living adjustment
December 2014	$ 92.90	Cost of living adjustment

What We Will Pay

- Her first payment is for $3,462.00.
- This is the money she is due through January 2016.
- Her next scheduled payment of $92.00, which is for February 2016, will be received on or about the third of March 2016.
- After the first payment, she will receive $92.00 on or about the third of each month.

* * * * *

We are sending a copy of this notice to your representative.

Health Insurance For Children

If this notice is for a child under age 19 who is not covered by health insurance, there is a Children's Health Insurance Program that may help. To find out more, you can look on the Internet at www.insurekidsnow.gov or call, toll free, 1-877-KIDS-NOW (1-877-543-7669). The number connects you to your state program.

Information About Representative's Fees

When a representative wants to charge for helping with a Social Security claim, we must first approve the fee. We usually withhold 2[redacted]e benefits in order to pay the approved representative's fee. We withheld $878.00 from [redacted] past due benefits in case we need to pay her representative.

- If all the work on this case for [redacted] and her family is finished, and your representative wants to charge a fee, a request to have it approved should be sent to us right away.

- If all work is not finished in this case, the representative should let us know that a fee will be charged. This must be done within 60 days of the date of this letter.

- If the representative will not charge a fee, a statement saying so, signed and dated by the representative, should be sent to us instead.

When the amount of the fee is decided, we will let [redacted] and the representative know how much of this money will be used to pay the fee. We will send any remainder to [redacted] the approved fee is more than the money we have withheld, the Social Security Administration is not involved in paying the rest of the fee.

Other Social Security Benefits

These benefits are the only benefit she can receive from us at this time. In the future, if you think she might qualify for another benefit from us, she will need to apply again.

* * * * *

report changes to us right away.

We have enclosed a pamphlet, "What You Need To Know When You Get Retirement Or Survivors Benefits." It tells you what must be reported and how to report.

Do You Think We Are Wrong?

If you do not agree with this decision, you have the right to appeal. We will review [redacted] case and look at any new facts you have. A person who did not make the first decision will decide her case. We will review the parts of the decision that you think are wrong and correct any mistakes. We may also review the parts of our decision that you think are right. We will make a decision that may or may not be in her favor.

- You have 60 days to ask for an appeal.
- The 60 days start the day after you receive this letter. We assume you received this letter 5 days after the date on it unless you show us that

you did not receive it within the 5-day period.

- You must have a good reason if you wait more than 60 days to ask for an appeal.

- You can file an appeal with any Social Security office. You must ask for an appeal in writing. Please use our "Request for Reconsideration" form, SSA-561-U2. You may go to our website at www.socialsecurity.gov/online/ to find the form. You can also call, write, or visit us to request the form. If you need help to fill out the form, we can help you by phone or in person.

Suspect Social Security Fraud?

Please visit http://oig.ssa.gov/r or call the Inspector General's Fraud Hotline at 1-800-269-0271 (TTY 1-866-501-2101).

* * * * *

at 1-800-772-1213, or call your local Social Security office at 1-866-217-0721. We can answer most questions over the phone.

If you are deaf or hard of hearing, you may call our TTY number, 1-800-325-0778. You can also write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
4990 S CLYDE MORRIS
PORT ORANGE, FL 32127

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

Social Security Administration

Enclosure(s):
SSA Pub No 05-10077

No. 17-773

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

"Fees for [the] representation of individuals claiming Social Security old-age, survivor, or disability benefits [at] the administrative and judicial review stages [are handled] discretely: [42 U.S.C.] § 406(a) governs fees for representation in administrative proceedings; § 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002). Section 406(b) specifies in particular that

> [w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee *for such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A) (emphasis added).

The question presented is:

Whether fees subject to § 406(b)'s 25-percent cap include, as the Sixth, Ninth, and Tenth Circuits hold, only fees for representation in court or, as the Fourth, Fifth, and Eleventh Circuits hold, also fees for representation before the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to Richard A. Culbertson and the then-Commissioner of Social Security, Celalettin Akarcay, Darleen R. Schuster, Bill J. Westfall, and Katrina F. Wood were parties in the consolidated proceeding in the court of appeals. Among the non-governmental parties, Richard A. Culbertson is the real party in interest. Pet. App. 3a, n.1. Since the case concerns fee awards related to the representation of only Katrina F. Wood, petitioner believes that Celalettin Akarcay, Darleen R. Schuster, and Bill J. Westfall, have no interest in the case's outcome. See Rule 12.6.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The district court's order of April 20, 2016 on Plaintiff's Amended Consent Motion For Attorney's Fees (Pet. App. 18a-29a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari until November 23, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent parts of the relevant statutory provisions, 42 U.S.C. § 406(a)-(b), appear in the appendix to the petition for a writ of certiorari. Pet. App. 58a-64a.

STATEMENT

A. Statutory Background

Title II of the Social Security Act, 42 U.S.C. § 401 et seq., governs the award and collection of fees by attorneys representing claimants seeking old-age, survivor, or disability insurance benefits. Section 406(a) governs the award and collection of attorney's fees for representing Social Security claimants before the agency. Section 406(b), by contrast, governs the award and collection of fees by attorneys for representing claimants in court.

Section 406(a) provides two ways for an attorney to obtain fees for work before the agency: the "fee petition process" and the "fee agreement process." The "fee petition process" is governed by § 406(a)(1). When the agency acts favorably to the claimant, § 406(a)(1) authorizes the Administration to "fix * * * a reasonable fee to compensate [the] attorney for the services performed by him in connection with such claim." 42 U.S.C. § 406(a)(1). Section 406(a)(1) requires that any such award be "reasonable" but does not otherwise limit it. *Ibid.* And the agency "may authorize a fee even if no benefits are payable." 20 C.F.R. § 404.1725(b)(2).

The "fee agreement process" is governed by § 406(a)(2). Under it, the attorney and the claimant enter into a written fee agreement and submit it to the agency before it determines the claimant's benefits. 42 U.S.C. § 406(a)(2)(A). If the agency acts favorably to the claimant, it "shall approve" the fee agreement at the time of the determination, provided the fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. *Id.* § 406(a)(2)(A)(iii); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). The claimant or the agency adjudicator can request agency review of the fees if either believes the agreed-upon amount is excessive under the particular circumstances of the case. *Id.* § 406(a)(3)(A)(i).

Section 406(b), by contrast, governs the fees an attorney may charge a claimant for representation *in court*. It states that

> [w]henever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A). The particular question concerns whether § 406(b)'s allowance of "reasonable fee[s] for *such representation*," *ibid.* (emphasis added), includes representation before the agency or only before the court.

B. Procedural Background

1. In 2008, Katrina F. Wood, represented by Richard A. Culbertson, filed for Social Security disability benefits but was determined by the Administrative Law Judge (ALJ) not to be disabled. Pet. App. 28a. After the Appeals Council denied review, Wood sought review in the district court, which reversed and remanded the agency's decision. *Ibid.* The court also awarded Wood $4,107.27 in attorney's fees under the Equal Access to Justice Act (EAJA).[1]

---

[1] The EAJA separately "requires the government to pay the fees and expenses of a 'prevailing party' [in a civil proceeding] unless the government's position was 'substantially justified.'" *Parrish* v. *Commissioner of Soc. Sec. Admin.*, 698 F.3d 1215, 1218 (9th Cir. 2012) (quoting 28 U.S.C. § 2412(d)(1)(A)). As compared to awards under § 406(a)(2) and § 406(b) of the Social Security Act (SSA), EAJA awards are not determined as a percentage of the amount recovered, but rather are based on the "time expended" and the attorney's hourly rate. *Ibid.* (quoting *Gisbrecht* v.

Pet. App. 22a. At that point, Wood and Culbertson entered into a fee agreement providing for attorney's fees for future work in the amount of 25 percent of any past-due benefits minus attorney's fees paid under the EAJA. Pet. App. 19a, 22a. On reconsideration, the agency awarded Wood past-due benefits of $35,211 for herself and a child beneficiary, Pet. App. 4a, 27a, and, pursuant to § 406(a), awarded Culbertson $2,865 in attorney's fees for representing her before the agency, Pet. App. 5a, 22a, which would come out of her awarded past-due benefits, *ibid.*

Wood then asked the district court to authorize a payment of $4,488.48 in attorney's fees to Culbertson under § 406(b) for his work reversing the agency's initial decision in court. Pet. App. 19a. The request followed the terms of the fee agreement and represented 25 percent of the past-due benefits that Wood had collected ($8,595.75) minus the fees already awarded under the EAJA ($4,107.27). Pet. App. 22a. Relying on Fifth Circuit precedent adopted by the Eleventh Circuit and two unpublished Eleventh Circuit decisions, see Pet. App. 20a (following *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) and citing

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Barnhart, 535 U.S. 789, 796 (2002)). In 1985, Congress amended the EAJA to allow attorneys to receive fees under both § 406(b) of the SSA and § 2412 of the EAJA. *Ibid.* If both awards are for the "same work," *ibid.*, however, the attorney must "refun[d] to the claimant the amount of the smaller fee," *Gisbrecht*, 535 U.S. at 796 (quoting Pub. L. 99-80, § 3, 99 Stat. 186 (1985)) (alteration in original). This "effectively increases the portion of past-due benefits the successful Social Security claimant may pocket." *Ibid.* The lawyer gets nothing extra.

Paltan v. *Commissioner of Soc. Sec.*, 518 F. Appx. 673 (11th Cir. 2013) and *Bookman* v. *Commissioner of Soc. Sec.*, 490 F. Appx. 314 (11th Cir. 2012) as persuasive authority), the district court held, however, that § 406(b) imposed a 25-percent cap on the total amount of attorney's fees that could be awarded under *both* § 406(a) and § 406(b), Pet. App. 26a. It thus declined to award Culbertson for his work in court 25 percent of the past-due benefits minus the EAJA award, as the fee agreement provided. *Ibid.* The district court instead awarded only $1,623.48, which represented 25 percent of the past-due benefits minus *both* the EAJA award and the § 406(a) fees awarded by the Commissioner. *Ibid.*

2. On appeal, the Eleventh Circuit affirmed the district court's order. Pet. App. 17a. It first rejected the claimant's argument that *Dawson*, the controlling Fifth Circuit precedent adopted by the Eleventh Circuit, see Pet. App. 11a, limited only the amount the agency could itself *pay out* from past-due benefits, not the amount the district court could *authorize* for payment, Pet. App. 13a. Next, it acknowledged that three other circuits "do not apply the 25% limit in § 406(b) to the aggregate fee award under § 406." *Ibid.* Although that was "[t]rue," the court argued (1) that all those cases "explicitly or implicitly recognize that Dawson limited the combined § 406(a) and (b) attorney's fees awards to 25% of past-due benefits," *ibid.*, (2) that "[t]he Fifth Circuit continues to read Dawson to limit the aggregate award," Pet. App. 14a n.5 (citations omitted), and (3) that "the Fourth Circuit [has] relied on Dawson to support its holding that

§ 406(b) limits the combined § 406 fee award to 25% of past-due benefits," *ibid.* "To the extent Mr. Culbertson points to other circuits to argue Dawson was wrongly decided," the court noted, "this does not empower us to ignore it." Pet. App. 14a. "We are," it continued, "bound by this circuit's prior panel precedent rule to apply Dawson's holding unless it is overruled by the Supreme Court or by this Court sitting en banc." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

The Eleventh Circuit incorrectly applied § 406(b)'s 25-percent cap to limit the aggregate award of attorney's fees without regard to whether those fees were authorized under § 406(a) for representation before the agency or § 406(b) for representation before the court. Pet. App. 12a-14a. This approach contravenes the plain meaning of the statute by misunderstanding the antecedent of the phrase "such representation"; ignores the fact that the structure of the statute treats the award mechanisms in § 406(a) and § 406(b) as independent and distinct; undermines the congressional purpose of encouraging effective legal representation of claimants; misconstrues the practical effect of allowing independent awards of attorney's fees under both § 406(a) and § 406(b); and misinterprets § 406(b)'s legislative history as applying to representation before the agency.

I. If "the statutory text is plain and unambiguous," the court "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). The language of § 406(b) is plain. When a court "renders a judgment favorable to a

claimant * * * who was represented before the court by an attorney," the court may award "a reasonable fee for such representation" that is limited to 25 percent of the claimant's past-due benefits. 42 U.S.C. § 406(b)(1)(A). The antecedent of "such representation" is representation "before the court by an attorney." *Ibid.* Indeed, representation "before the court" is the only type of representation mentioned in § 406(b). Whereas § 406(a)(1) explicitly references representation "before the Commissioner for benefits," § 406(b) contains no such language. As a result, § 406(b)'s 25-percent cap on attorney's fees cannot be read to apply to representation before an agency without violating the plain text of the statute.

II. When the language of the statute is plain, the Court need not look beyond it. Even so, if the Court were to look beyond the plain language of the statute, the structure of § 406 confirms what the plain language makes clear—that the award mechanisms in § 406(a) and § 406(b) function independently and distinctly. Section 406(a) governs the award of fees for attorneys appearing "before the Commissioner" and provides two possible methods for determining a "reasonable" fee. 42 U.S.C. § 406(a). If the fee is based on a prior fee agreement between the attorney and the claimant, the statute deems it reasonable only if it falls below the lesser of a 25-percent cap or $6,000. *Id.* § 406(a)(2)(A); Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). In comparison, if the fee is determined by the agency, where there is arguably less potential for excessive fees, the fee is subject only to a general reasonableness

limitation. *Id.* § 406(a)(1). If it deems such a fee reasonable, the agency is free to award attorney's fees that exceed 25 percent of the claimant's past-due benefits.

Section 406(b), on the other hand, addresses proceedings before the district court. Because Congress was similarly concerned that claimant's attorneys would submit requests for excessive fees, it applied a separate 25-percent cap on awards of attorney's fees for representation "before the court." 42 U.S.C. 406(b)(1)(A).

In light of this structure, applying § 406(b)'s 25-percent cap to an agency's award of attorney's fees under § 406(a) would lead to illogical and incongruous results. If the agency's award were governed by § 406(a)(2), the application of § 406(b)'s 25-percent cap would be unnecessarily duplicative. Attorney's fees awarded by an agency would be subject to a 25-percent cap twice—a useless form of double counting. Even more absurdly, reading § 406(b) to include § 406(a)(1) fees under its own 25-percent cap would require the court to declare fees exceeding 25 percent of past-due benefits, which § 406(a)(1) authorizes when "reasonable," effectively unreasonable under § 406(b).

III. In drafting § 406, Congress sought to accomplish two interrelated purposes: namely, to "encourage effective legal representation of claimants" and to limit "inordinately large [representation] fees." *Hearings on H.R. 6675 Before the Senate Comm. on Fin.*, 89th Cong. 513 (1965) (*Hearings*) (supplemental report submitted by the Dep't of Health, Educ., & Welfare). Applying § 406(b)'s 25-percent cap only to work done before the

district court promotes the former purpose in a manner that is consistent with the latter.

The social security system is a complex regulatory scheme and pro se claimants are significantly less likely to win a favorable ruling. Representation by social security attorneys in proceedings before both the agency and the court is often necessary to vindicate the rights of claimants. It is not uncommon, however, for a plaintiff to have different representation before the agency, where representation by a non-attorney is permitted, than before the court. As a result, if § 406(b)'s 25-percent cap were interpreted to include fees for representation before the agency, the representative before the agency could effectively "use up" the cap, leaving no fees for the attorney who represented the claimant before the court and discouraging attorneys from ever taking on such cases. Even if the same attorney agreed to represent a claimant before the agency and before the court, applying § 406(b)'s cap to both proceedings would undermine the claimant's quality of representation: the additional costs of going to court would not be offset by additional fees, discouraging attorneys from seeking judicial review of an adverse agency holding. Separate treatment of attorney's fees under § 406(a) and § 406(b) is thus necessary to encourage effective representation of claimants through all stages of the proceedings.

Such encouragement does not come at the expense of claimants. Allowing an attorney to receive separate compensation for representation rendered before both the agency and the court does not pose a significant

risk of excessive fees that substantially detract from the value of the plaintiff's benefits. Attorney's fees under § 406(b) are calculated only in terms of the claimant's past-due benefits. Social security beneficiaries, however, may receive a wide range of additional forward-looking benefits. Thus, allowing an attorney to recover additional reasonable compensation under § 406(b) will not risk diverting a significant portion of the claimant's total financial award to the attorney.

IV. While the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (citing *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436 (2016)), proper consideration of the legislative history supports the holding that § 406(b)'s 25-percent cap does not apply to fees awarded for representation before the agency. In hearings before the Senate Committee on Finance, the Department of Health, Education, and Welfare expressed concern over "inordinately large fees for representing claimants *in Federal district court actions*." *Hearings* 513 (supplemental report submitted by the Dep't of Health, Educ., & Welfare) (emphasis added). The legislative history of § 406(b) expresses no concern over fees awarded for representation before the agency under § 406(a).

ARGUMENT

I. The Plain Language Of Section 406(b) Makes Clear That A Court Should Not Consider Fees Awarded Under Section 406(a) As Subject To Section 406(b)'s 25-Percent Cap

This Court has long held that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) (citations omitted).

The language of 42 U.S.C. § 406(b) is plain. In relevant part, the statute provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. § 406(b)(1)(A).

Section 406(b) begins by defining *when* a judge may award attorney's fees: "[w]henever a court renders a judgment favorable to a claimant * * * who was represented before the court by an attorney." 42 U.S.C. § 406(b)(1)(A). It then specifies *how much* the attorney may receive—"a reasonable fee * * * not in excess of 25 percent of the total of the past due benefits to which the claimant is entitled by reason of such

judgment," *ibid.*—and *for what* matters the attorney may bill: "for such representation," *ibid.* The adjective "such" is "used to avoid repetition" and it means "of the sort or degree previously indicated." Webster's Third New International Dictionary 2283 (1976). "[S]uch representation," then, can refer only to representation "before the court"—the only type of representation mentioned in § 406(b). In no way can it include fees for representation before the agency. Reading in a limitation of 25 percent on the total fees awarded under both § 406(a) and § 406(b) therefore violates the "cardinal canon" of construction that a court is to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted).

Unlike § 406(b), § 406(a) does refer to fees provided for representation "before the Commissioner for benefits." 42 U.S.C. § 406(a)(1). Reading an aggregate limitation into § 406(b) therefore also runs counter to the principle of *expressio unius est exclusio alterius*, the notion that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Because Congress used the "particular language" of "before the court" in regard to fees awarded under subsection (b) and did not include the "particular language" of "before the Commissioner," it cannot have intended for § 406(b)'s cap to extend to awards under § 406(a).

Congress knows, moreover, how to set aggregate fee caps. Section 406(a) provides that if a claimant prevails on both an old-age, survivors and disability insurance claim under Title II and a separate supplemental security income claim under Title XVI the agency may approve the fee agreement only if "the total fee or fees specified in such agreement do[] not exceed, in the aggregate," $6,000. 42 U.S.C. 406(a)(2)(C). Had Congress wanted § 406(b) to similarly cap aggregate fees, it would have used similar language. But it did not.

Likewise, Congress knows how to provide fee offsets and its failure to expressly do so here indicates that fees awarded under § 406(a) are not intended to offset fees awarded under § 406(b). Congress, for example, expressly provided that EAJA fees offset § 406(b) fees. Pub.L. 99-80, § 3, 99 Stat. 186 (1985). But, tellingly, it has not similarly provided for any offset of § 406(a) fees against § 406(b) fees.

When the words of a statute are unambiguous, as they are in § 406(b), the "judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). The Court thus need not consult either the statutory structure, the congressional purpose, or the legislative history, but, in fact, all three point in the same direction as the plain language.

II. Section 406's Structure Creates Distinct Avenues For Awarding Fees For Administrative And Judicial Representation

The statutory structure confirms what the plain language makes clear—Congress created two distinct and independent award mechanisms in § 406(a) and § 406(b). Section 406(a) itself provides two ways for an attorney to seek fees for representing a claimant in administrative proceedings: the fee-petition process and the fee-agreement process. Under the former, the agency authorizes a "reasonable fee" to be paid to the claimant's representative.[2] 42 U.S.C. § 406(a)(1). Under the latter, any fee set by agreement between the attorney and the claimant presumptively controls so long as it does not exceed the lesser of 25 percent of the claimant's past-due benefits or $6,000. Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080 (Feb. 4, 2009). The claimant or the agency adjudicator can, however, request agency review of the fees if either believes the agreed-upon amount is excessive under the particular circumstances of the case. *Id.* § 406(a)(3)(A)(i).

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[2] The agency has given this reasonableness inquiry real teeth. In determining whether a fee request is reasonable, it must consider "[t]he extent and type of services the representative performed"; "[t]he complexity of the case"; "[t]he level of skill and competence required of the representative"; "[t]he amount of time the representative spent on the case"; "the results the representative achieved"; and "the amount of fee the representative requests." 20 C.F.R. § 404.1725(b)(1). The agency also allows both the claimant and the attorney to seek administrative review of fees authorized under the petition process. *Id.* § 404.1720(d).

Section 406(b), on the other hand, governs awards for attorneys representing claimants before a court. 42 U.S.C. § 406(b). Given that § 406(a) sets forth two separate avenues for determining attorney's fees for representation before the agency, it would not make sense to interpret § 406(b) to regulate awards for representation there. There is simply no need for § 406(b) to regulate awards already deemed "reasonable" under § 406(a) either by the agency itself or by Congress's safe harbor. Section 406(a)'s two attorney's fee provisions effectively check excessive fees for representation before the agency. Checking them again under a provision designed to check fees for representation in court represents an insidious form of double counting.

As the Ninth Circuit has pointed out, moreover, the statute does not cap the reasonable fees the agency can award through the petition process. *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008). Because § 406(a)(1) authorizes the agency to award reasonable fees above 25 percent of past-due benefits, it makes no sense for § 406(b) to include such fees under its own 25-percent cap. In many cases, that would mean that fees authorized as "reasonable" under § 406(a)(1) would be effectively unreasonable under § 406(b).

Congress structured the statute to separate fee determinations by forum for a reason: claimants may use different representatives before the agency and the courts. Even a non-lawyer, for example, can represent—and receive fees for representing—a claimant before the agency. See Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017,

Informational Report: Agency Payments to Claimant Representatives 1 (2015), https://tinyurl.com/y97wvypq ("A claimant may appoint a qualified individual to act on his/her behalf in matters before the Social Security Administration."). Only attorneys, by contrast, can represent claimants in court and be awarded fees for doing so. Soc. Sec. Admin., *Program Operations Manual System* GN 03920.017 § D.5 n.2, https://tinyurl.com/yahfryzb ("In court cases, the law does not provide for direct payment to a non-attorney."). The Social Security Administration (SSA) recognizes that representation may change between agency and court proceedings. See *id.* GN 03920.060 § A.5, https://tinyurl.com/yd53d2la ("The attorney(s) for the court proceedings may differ from the representative(s) for the SSA administrative proceedings."). Even when representation does not change, however, it would be nonsensical for a representative to accept the same fee when benefits are obtained on the first try in agency proceedings as compared to when they are obtained after an agency denial, a trip to the federal courts, and a return back to the agency.

That the structure of § 406 provides separate fee caps for administrative and court proceedings is clear from the face of the statute. Any suggestion otherwise, moreover, is further rebutted by SSA's Program Operations Manual System (POMS). POMS contains administrative interpretations that "warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift." *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385

(2003). Here, POMS closes the door on any suggestion that administrative and court representation fees share a single fee cap.

POMS instructs administrators to withhold only 25 percent of a claimant's past-due benefits for payment of both § 406(a) and (b) representation fees—and it anticipates situations in which the combined fee total will surpass that 25 percent. Soc. Sec. Admin., *Program Operations Manual System*, GN 03920.050 § C, https://tinyurl.com/yak75mr8. "In a dual fee situation (i.e., authorization of both administrative and court-awarded fees), although the court fee and the administrative fee combined may exceed 25 percent of the [past-due benefits]," SSA will "only pay up to 25 percent, as required by law." *Ibid.* Representatives "must look to the claimant for payment of the portion" that exceeds the 25-percent withholding cap. *Id.* § D.1, https://tinyurl.com/yak75mr8.

It is both consistent with and expected by the statute that situations arise in which total representation fees exceed 25 percent of past-due benefits. The fee authorization system is thus not designed to limit total fee awards to 25 percent of past-due benefits. Fees claimed before a federal court "are not subject to authorization by SSA." Soc. Sec. Admin., *Program Operations Manual System*, GN 03910.001, https://tinyurl.com/y9u7wdfp. The "court's authorization is for services before the court only, while SSA's authorization is for services before SSA only." *Id.* GN 03920.060 § A.4, https://tinyurl.com/yd53d2la. Fees authorized by either SSA or courts are submitted to

SSA for processing and direct payment. *Id.* GN 03920.050 § D.1. If dual fees are submitted, SSA does not take steps to reduce the total fees to less than 25 percent of past-due benefits. It simply pays out the fees in the order authorization is received until the withheld 25 percent of past-due benefits runs out. *Id.* § D.4. Representatives are not barred from collecting additional fees at this point—but they must turn to the claimant to collect them. *Id.* § D.1. If dual fee authorizations are received at the same time, SSA will prorate the fees to fit within the withholding cap, and, again, representatives can collect the remainder from claimants. *Id.* §§ D.1, D.4.

III. Applying A Cap Of 25 Percent Under Section 406(b) For Work Done Before Both The Agency And The Courts Undermines Congress's Purpose

Because the words of § 406(b) are unambiguous, this Court need not consider Congress's purpose in enacting it. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous * * * judicial inquiry is complete.") (internal quotation marks omitted). But to the extent that a statute's "object and policy" may color its interpretation, *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850), the underlying purpose of § 406(b) confirms the plain reading of its text. In enacting § 406(b), Congress sought to "encourage effective legal representation of claimants" and to limit "inordinately large fees" incurred in their representation before the courts. *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 513

(1965) (*Hearings*) (supplemental report submitted by the Dep't of Health, Educ., & Welfare). Applying § 406(a) and § 406(b) as distinct and independent award mechanisms furthers this first purpose in a manner consistent with the second.

A. A 25-Percent Aggregate Cap Is Inconsistent With Contingent Fee Arrangements And The SSA's Procedure For Distributing Fees

Beneficiaries of Social Security programs are among the nation's most vulnerable and indigent people. See, *e.g.*, Joyce Nicholas, *Prevalence, Characteristics, and Poverty Status of Supplemental Security Income Multirecipients*, 73 Soc. Sec. Bull. No. 3, 2013, at 11 (noting that over 40 percent of SSI beneficiaries live in poverty); Kathleen Romig & Arloc Sherman, *Social Security Keeps 22 Million Americans Out of Poverty: A State-by-State Analysis*, Ctr. on Budget & Pol'y Priorities (last updated Oct. 25, 2016), https://tinyurl.com/ybxqf8bs (concluding that, without Social Security, over 22 million more Americans would live in poverty). Due to severe financial constraints, claimants are reliant upon contingent fee agreements to obtain counsel, which "provide the only practical means by which one * * * can economically afford * * * the services of a competent lawyer." Model Code of Prof'l Responsibility EC 2-20 (Am. Bar Ass'n 1980). Recognizing that "the marketplace for Social Security representation operates largely on a contingency fee basis," this Court has permitted contingent fees, subject to the 25-percent cap under § 406(b). *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 804 (2002) (citations

omitted). But if the 25-percent cap is misconstrued as an aggregate limit on awards issued under both § 406(a) and § 406(b), attorneys will lack the financial incentive to represent the "needy individuals" who qualify for Social Security benefits. See 42 U.S.C. § 306(a).

Consider the following not uncommon scenario. One attorney represents a claimant before the agency, which denies past-due benefits. Soc. Sec. Admin., *FY 2016 Congressional Justification* 143 (2015) (noting that 68 percent of disability claims are initially denied at the agency). Both the claimant and the attorney receive nothing. Another attorney specializing in court work agrees to seek judicial review of the agency's decision and succeeds on appeal. It is largely this attorney's success in the district court that allows the claimant and the earlier attorney to receive anything if the earlier attorney is then successful on remand. As this Court has acknowledged, however, "virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits." *Gisbrecht*, 535 U.S. at 803 (citation omitted). Thus, under the Eleventh Circuit's rule, the earlier attorney can "use up" all of the allowable fees for her payment, possibly foreclosing any payment for the later one.

The possibility of the earlier attorney receiving all the allowable fees will strongly discourage other attorneys from helping claimants seek judicial review. And, realizing that fewer attorneys would agree to seek review of an adverse agency determination, fewer

attorneys will be willing to represent claimants in the initial agency proceedings. Even if the earlier attorney were willing to seek judicial review herself, moreover, she would understand that the many additional hours required for an appeal might entitle her to no additional fees. In a world where contingent fees for civil litigation typically "rang[e] from 33% to 50%" and "seldom amount to less than 33%" of the recovery, Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1347, 1351 (1996), the possibility of receiving fees of less than 25 percent, let alone no fees at all, would strongly discourage attorneys from representing Social Security claimants. The brunt of these disincentives will be borne most severely by the millions of vulnerable individuals that rely on Social Security for their subsistence. See Soc. Sec. Admin., *Annual Statistical Supplement to the Social Security Bulletin, 2017*, at 2, 4 (2018) (providing that there were 60.9 million OASDI beneficiaries and 8.3 million SSI beneficiaries in 2017).

B. Effective Counsel Is Crucial To Claimant Success Before The Courts And Agency

Claimants filed 19,295 Social Security cases in federal district court in 2017, accounting for 6.61 percent of all civil cases initiated there. Admin. Office of the United States Courts, *Federal Judicial Caseload Statistics 2017*, https://tinyurl.com/y7xrekm9. Pro se litigants face "particular pressures" in civil litigation due to unfamiliarity with the procedural and substantive laws and an inability to effectively gather

and present evidence. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475, 482-483 (2002). The ultimate success of claims may, accordingly, hinge on the availability of competent counsel. *E.g.*, *id.* at 483 n.41 (noting the complexity of the Social Security Act).

In 2017, the district courts remanded 48.65 percent of Social Security cases to the agency, Soc. Sec. Admin., *Court Remands as a Percentage of New Court Cases Filed*, https://tinyurl.com/y9dlnqpe, a figure that has been remarkably steady, U.S. Gov't Accountability Office, GAO-07-331, *Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, but Needs to Manage Data Better on the Increasing Number of Court Remands* 3 (2007) (2007 GAO Report) (between 1995 and 2005, district courts remanded almost 50 percent of Social Security cases to the agency). On remand, moreover, 66 percent of claimants were awarded benefits. 2007 GAO Report 3. Thus, facilitating access to competent counsel for district court proceedings would enable very many claimants each year to obtain the Social Security benefits that they deserve and often desperately require.

Attorney representation before the agency is just as important, if not more so. In 2017, "SSA received over 2.4 million initial and 583,000 reconsideration claims." Office of the Inspector Gen., Soc. Sec. Admin., No. A-02-18-50298, *Fiscal Year 2017 Inspector General's Statement on the Social Security Administration's Major Management and Performance Challenges* 1

(2017), https://tinyurl.com/y8bdzuh2. In an extensive study, the GAO found that parties that were represented by attorneys were 3.3 times more likely to be successful in hearings before ALJs than unrepresented parties were. U.S. Gov't Accountability Office, GAO-04-14, *SSA Disability Decision Making: Additional Steps Needed to Ensure Accuracy and Fairness of Decisions at the Hearings Level* 51-52 (2003) (analyzing data from 1997-2000).

Should the Eleventh Circuit's interpretation of § 406(b) be endorsed, fewer attorneys will be willing to represent Social Security claimants. Interpreting § 406(b) as a distinct award mechanism is therefore essential to fulfilling Congress's purpose to provide "effective legal representation" to claimants who cannot otherwise afford it. See *Hearings on H.R. 6675 Before the S. Comm. on Fin.*, 89th Cong. 512-513 (1965) (Supplemental report submitted by Dep't of Health, Educ., & Welfare) (*Hearings*).

C. Applying § 406(b) As A Distinct Award Mechanism Will Not Result In Excessive Fees

The plain reading of the text is consistent, moreover, with Congress's second purpose to limit "inordinately large fees" incurred in the representation of Social Security claimants. *Hearings* 513 (Supplemental report submitted by Dep't of Health, Educ., & Welfare). According to the most recent data, the median annual income for attorneys and eligible claimant representatives from direct fee payments was only $20,300. Office of the Inspector

Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* App. C-1 (2015), https://tinyurl.com/y97wvypq. Any concern that attorneys would abuse § 406(b) to charge excessive fees is unfounded and overblown. Attorneys who represent claimants in Social Security proceedings do not do so in order to get rich. Rather, these attorneys accept relatively modest compensation to provide a critical service to our country's most needy and vulnerable individuals.

When a claimant prevails in obtaining disability benefits, whether before the agency or a court, she is entitled to receive monthly benefits "as long as [her] medical condition has not improved and [she] can't work." Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits*, at 1 (2017), https://www.ssa.gov/pubs/EN-05-10153.pdf. As the Ninth Circuit recognized, these "future benefits * * * may far exceed the past-due benefits awarded." *Crawford* v. *Astrue*, 586 F.3d 1142, 1150 (2009). Given the structure of the SSDI program, this makes perfect sense. Past-due benefits compensate a worker for payments to which she was entitled both before and during the legal proceeding. Disability benefits, however, extend far into the future and unlock other sources of support. First, benefits continue for as long as the worker is disabled—so long as they do not reach full retirement age or engage in substantial work. And these benefits increase to keep pace with inflation. See 42 U.S.C. § 415(i)) (providing "cost-of-living increases in benefits").

Second, disability insurance benefits for the individual worker, whether past-due or for the future, are only one part of the total benefits that come from the program. Once a beneficiary has met the requirements for SSDI, benefits are also available for spouses and dependent children. Soc. Sec. Admin., *Benefits Planner: Disability*, https://www.ssa.gov/planners/disability/family.html. Nearly one-fifth of all program beneficiaries are family members of disabled workers. Soc. Sec. Admin., *Annual Statistical Report on the Social Security Disability Insurance Program, 2016*, at 17 tbl. 1 (2017) (*2016 Statistical Report*). After a two-year waiting period, beneficiaries are also eligible for Medicare, which is usually not available to those under 65 years of age. Soc. Sec. Admin., *What You Need to Know When You Get Social Security Disability Benefits* 7 (2017). This additional benefit is significant. Medicare provides over $10,000 a year in benefits to the average participant. See Henry J. Kaiser Family Found., *Medicare Spending per Enrollee, by State* (2017), https://tinyurl.com/y92da5hb (based on data provided by the Centers for Medicare and Medicaid Servs.) (*Kaiser Medicare Study*). In 2016, for example, half of all disabled workers who became SSDI beneficiaries were under the age of 55, more than a decade from the usual eligibility age. *2016 Statistical Report* 97 tbl. 36. A favorable determination in a disability claim, therefore, often leads to additional years of Medicare enrollment and tens of thousands of dollars in additional benefits.

SSA data demonstrate how substantial future benefits can be. In 2016, the most recent year for

which complete figures are available, the average disability enrollee was 54 years old, *2016 Statistical Report* 58 tbl. 19., and received a monthly benefit of nearly $1,200, *id.* at 18 tbl. 2. If this enrollee had a spouse or one child (as does petitioner's client, Ms. Wood) the average benefit rose to approximately $1,500 per month or almost $18,000 per year. *Ibid.* After ten years, this enrollee would receive about $180,000 in present-value discounted SSDI payments alone.[3] Medicare benefits during this time, after the two-year waiting period, would be nearly $88,000, see *Kaiser Medicare Study*, for a total of nearly $270,000.

As these data show, past-due benefits are a small share of the total benefits an enrollee may receive from a successful claim. If § 406 is read according to its plain meaning, claimants would still receive 100 percent of their future benefits. If our representative enrollee were entitled to four years of past-due benefits when the district court remanded the case to the agency (as Ms. Wood was), the initial award would be nearly $72,000. Pet. App. 11a. Twenty-five percent of that award—$16,000—is roughly 6 percent of the $270,000 the enrollee would expect to eventually receive as a result of the lawyer's in-court representation. That is hardly an excessive fee.

Given how much is at stake, an attorney's fee of—at most—a quarter of past-due benefits is in the best interest of the disabled worker. The correct reading of

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[3] Since social security disabililty benefits increase with inflation, see 42 U.S.C. § 415(i) (providing "cost-of-living increases in benefits"), proper present-value discounting and inflation-adjusting roughly cancel each other out in the example.

§ 406 ensures that attorneys representing disabled workers receive a reasonable fee—and no more—for their work.

IV. The Legislative History Evinces Congress's Intent That Section 406(b)'s 25-Percent Cap Apply Only To Fees Awarded For In-Court Representation

Those courts aggregating agency and court fee awards under § 406(b) have relied almost exclusively on legislative history to reach this result. That is mistaken. Not only is such reliance suspect, *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."), but the text of § 406 is so clear that a court "need not consider [any] extra-textual evidence," *ibid.*; see also *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.") (citations and internal quotation marks omitted). Properly considered, however, the legislative history actually supports the proposition that Congress intended for § 406(b)'s 25-percent cap to apply only to fees awarded for in-court representation.

Those courts holding that § 406(a) and § 406(b) fees must be aggregated under the 25-percent cap base their analysis on two pieces of legislative history: Hearings before the Senate Committee on Finance and a Senate Report. See *Morris* v. *Social Sec. Admin.*, 689 F.2d 495, 497 (4th Cir. 1982) (discussing the Senate Report); *Dawson* v. *Finch*, 425 F.2d 1192, 1194-1195 &

nn.2-3 (5th Cir. 1970) (discussing both documents); Pet. App. 11a-14a (adopting the Fifth Circuit's legislative history analysis in *Dawson*). Contrary to these courts' reading of them, both of these pieces of legislative history support the opposite conclusion—that Congress intended § 406(b)'s cap to apply only to fees for in-court proceedings.

The relevant part of the Senate Finance Committee hearings rests completely on a report submitted by the Department of Health, Education, and Welfare (HEW). *Hearings* 512-13 (supplemental report submitted by the Dep't of Health, Educ., & Welfare). While HEW's explanation does evince concern about "inordinately large fees," it goes on to clarify exactly what type of fees Congress had in mind. *Id.* at 513. As HEW explained:

> [A]ttorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in *Federal district court actions* arising under the social security program. Usually these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Ibid. (emphasis added). Simply put, the fees that Congress was concerned about when it enacted § 406(b)'s cap were those for in-court representation. The legislative history does not support the idea that

the 25-percent cap in § 406(b) was to apply to the aggregate fees earned under § 406(a) and § 406(b). That makes sense because fees for representation before the agency often go to a different person and are already subject to reasonableness review by the agency or a separate 25-percent cap. See pp. 13-17, *supra* (describing statutory scheme). They could not lead to "inordinately large fees" for representation in court.

A proper reading of the Senate report further bolsters the conclusion that Congress intended § 406(b)'s cap to apply only to fees for court representation. The Senate Report adopted HEW's explanation nearly verbatim. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, at 122 (1965) (S. Report) ("It has come to the attention of the committee that attorneys have upon occasion, charged what appear to be inordinately large fees for representing claimants in Federal district court."). And the report's section-by-section analysis of the bill reiterates that § 406(b) allows a court to award fees "not in excess of 25 percent of the total of the past due benefits which become payable as a result of the court's decision—for the attorney who represented the claimant *before the court*." S. Report 258 (emphasis added). The final House-Senate Conference Report on this legislation also adopted nearly identical language. H.R. Rep. No. 682, 89th Cong., 1st Sess., 62-63 (1965). At bottom, the legislative history supports the proposition that § 406(b)'s 25-percent cap applies only to in-court legal fees, not to the total fees before both the agency and the court.

This Court confirmed this view of § 406's legislative history in *Gisbrecht* v. *Barnhart*, 535 U.S. 789 (2002). From the outset of the decision, this Court discussed § 406(b) as "concern[ing] the fees that may be awarded attorneys who successfully represent Social Security benefits claimants *in court*." *Id.* at 792 (emphasis added). In reviewing the legislative history of § 406(b), this Court found that "Congress provided for 'a reasonable fee, not in excess of 25 percent of accrued benefits,' as part of the court's judgment, and further specified that 'no other fee would be payable'" for in-court representation. *Id.* at 804-805 (quoting S. Report 122). This limitation on in-court fees made sense, the Court noted, because "Congress was mindful * * * that the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed." 535 U.S. at 804. This Court specifically recognized that § 406(b) was Congress's attempt to "[a]ttend[] to the[] realities" of the potential length of benefit-determination litigation. *Ibid.* Since Congress intended for fees for "the administrative and judicial review stages" to be dealt with "discretely," *id.* at 794, it was perfectly sensible for it to subject each to different requirements. Putting a 25-percent cap on attorney's fees for representation in court was Congress's chosen approach. Given the problem Congress perceived at the time it enacted § 406(b), it did not see fit to include within that cap fees awarded under § 406(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2018

No. 17-773

In the Supreme Court of the United States

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
DEPUTY COMMISSIONER FOR OPERATIONS,
SOCIAL SECURITY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether 42 U.S.C. 406(b)(1)(A) establishes that 25% of a claimant's past-due benefits under Title II of the Social Security Act is the maximum aggregate amount of attorney's fees that may be charged for representing the claimant in both administrative and court proceedings under Title II.

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In the Supreme Court of the United States

No. 17-773

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
DEPUTY COMMISSIONER FOR OPERATIONS,
SOCIAL SECURITY ADMINISTRATION[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The order of the district court (Pet. App. 18a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 23, 2017, and the petition was filed on November 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The positions of Commissioner of Social Security and Deputy Commissioner of Social Security are vacant. Ms. Berryhill is performing the delegable duties and functions of the Commissioner of Social Security.

STATEMENT

1. The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain individuals eligible for such benefits under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability [OASDI] benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental security income (SSI) benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75. A claimant may seek administrative review of SSA's initial determination, including any denial of (past-due and ongoing) benefits to which she may be entitled, 42 U.S.C. 405(b), 1383(c)(1) and (2), and may then seek judicial review of the resulting final agency decision, 42 U.S.C. 405(g), 1383(c)(3).

Title II of the Social Security Act separately regulates the amount of attorney's fees that may be collected from an OASDI claimant for representing the claimant in agency proceedings, 42 U.S.C. 406(a), and on judicial review, 42 U.S.C. 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002).[2] "Collecting or even demanding from the client anything more than the authorized [fee for such representation] is a criminal offense." *Id.* at 796; see 42 U.S.C. 406(a)(5) and (b)(2). The question presented in this case is whether Section 406(b)(1)(A)

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[2] Title XVI of the Act incorporates most of the attorney's fee provisions for agency and court proceedings in Section 406(a) and (b) with modifications for SSI cases, 42 U.S.C. 1383(d)(2)(A), and separately addresses payment of such fees from past-due SSI benefits, 42 U.S.C. 1383(d)(2)(B). Title XVI fees are not at issue in this case.

establishes that 25% of the claimant's past-due benefits is the maximum aggregate amount of attorney's fees that may be charged for representing a claimant in both administrative and court proceedings under Title II.

a. *Fees for Administrative Proceedings.* Under Title II, an attorney may seek fees "[f]or representation of a benefits claimant at the administrative level" by either filing "a fee petition" with SSA under Section 406(a)(1) or seeking SSA's approval of a "fee agreement" with the claimant under Section 406(a)(2). *Gisbrecht*, 535 U.S. at 794.

i. *Fee petitions.* Section 406(a)(1) provides that "[t]he Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any [Title II] claim before the Commissioner." 42 U.S.C. 406(a)(1). Section 406(a)(1) further provides that, except as provided by provisions in Section 406(a)(2) governing fee agreements, "whenever the Commissioner of Social Security * * * makes a determination favorable to the claimant" on "any claim before the Commissioner for benefits under [Title II]" in which the claimant was represented by an attorney, "the Commissioner shall * * * fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim." *Ibid.*

SSA's implementing regulations require that the claimant's representative submit a "written request" for "approval of a fee for services * * * performed in dealings with [the agency]," which the representative should file with the agency "after the proceedings * * * are completed." 20 C.F.R. 404.1725(a). That fee petition must include, *inter alia*, a list of the services provided, the amount of time spent on each type of service, and the amount of the fee that the representative seeks to charge

for those services. 20 C.F.R. 404.1725(a)(2)-(3). In fixing the amount of a reasonable fee, the agency will "consider the amount of benefits, if any, that are payable," but the agency will ultimately "base the amount of fee [it] authorize[s]" on multiple factors and "may authorize a fee even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

ii. *Fee agreements.* In 1990, Congress enacted Section 406(a)(2), which established an alternate "streamlined process for a representative to obtain approval of [a] fee" for "representing a claimant before the agency" based on a written fee agreement. 74 Fed. Reg. 6080 (Feb. 4, 2009). A representative may invoke that process under Title II by "present[ing] in writing" to the agency "an agreement between the claimant" and the representative "prior to the time of the Commissioner's determination." 42 U.S.C. 406(a)(2)(A). If the Commissioner's determination is "favorable to the claimant" on a "claim of entitlement to past-due benefits" and "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of such past-due benefits" or a prescribed dollar amount (currently, $6000), see 42 U.S.C. 406(a)(2)(A)(ii) and (iii), the Commissioner "shall approve" the agreement "at the time of the favorable determination" and "the fee specified in the agreement shall be the maximum fee." 42 U.S.C. 406(a)(2)(A). Cf. 42 U.S.C. 406(a)(3)(A) (addressing administrative review of a fee approved based on a fee agreement).[3]

In a case involving a fee "agreement described in [Section 406(a)(2)](A)" that relates to both a claim for past-due

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[3] Congress has authorized the Commissioner to "increase the dollar amount under [Section 406(a)(2)(A)](ii)(II)" to reflect "the rate of increase in primary insurance amounts" after January 1, 1991. 42 U.S.C. 406(a)(2)(A). In 2009, the Commissioner increased the prescribed amount to $6000. 74 Fed. Reg. at 6080.

OASDI benefits (under Title II) and a claim for past-due SSI benefits (under Title XVI), Section 406(a)(2) imposes an additional requirement when the Commissioner makes "a favorable determination * * * with respect to both such claims." 42 U.S.C. 406(a)(2)(C). The Commissioner "may approve" such an agreement "only if the total fee or fees specified in [the] agreement" for representing the claimant before the agency on his Title II and Title XVI claims "does not exceed, in the aggregate, the [$6000] amount" noted above. *Ibid.*; see 42 U.S.C. 406(a)(2)(A)(ii)(II); p. 4 n.3, *supra*.

iii. *Direct payments to attorneys.* If SSA has approved a maximum attorney's fee under either the fee-petition or fee-agreement process and the claimant is "entitled to past-due benefits under [Title II]," the attorney may obtain payment for some or all of the approved fee directly from the government out of the claimant's past-due benefits. 42 U.S.C. 406(a)(4). In such cases, the Commissioner "shall * * * certify for payment" to the attorney "out of [the] past-due benefits * * * an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits" (minus an assessment charged to the attorney for the direct payment). *Ibid.*; see 20 C.F.R. 404.1730(b)(1) and (d); cf. 42 U.S.C. 406(d) (assessment). SSA's Program Operations Manual System (POMS) states that "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA may pay directly to the representative, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Nov. 2006), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017 (emphasis omitted).

b. *Fees for Court Proceedings.*

i. If a claimant seeks judicial review of a final agency decision under Title II, Section 406(b) governs the attorney's fees that may be charged to the claimant. 42 U.S.C. 406(b). Section 406(b) provides in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A). "[N]o other fee may be payable * * * for such representation except as provided in [Section 406(b)(1)]." *Ibid.*

The Commissioner then "may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits" (minus an assessment for the direct payment). 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1728(b); cf. 42 U.S.C. 406(d) (assessment). The POMS states that although "[t]he court fee is in addition to the fee, if any, SSA authorizes for proceedings at the administrative level," SSA will only "withhold[] a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both." POMS, GN 03920.017D.5, Note 1; accord POMS, GN 03920.035A (Feb. 2005), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920035.

ii. A provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), separately authorizes a court reviewing SSA's final decision to order the recovery of "reasonable attorney fees" from the United States in certain circumstances in which such fees were "incurred by [the prevailing claimant] in [his] civil action" and the

government's position was not "substantially justified." 28 U.S.C. 2412(d)(1)(A) and (2)(A). If the court awards fees under both Section 406(b) and Section 2412(d), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee,'" which can "effectively increase[] the portion of past-due benefits the successful Social Security claimant may pocket." *Gisbrecht*, 535 U.S. at 796 (citation omitted; first set of brackets in original).[4]

2. a. Claimant Katrina Wood applied for OASDI disability benefits under Title II of the Social Security Act, which SSA initially denied. See Pet. App. 3a; Supp. C.A. App. 12, 76. Petitioner is an attorney who represented Wood before SSA and, later, in district court. See Pet. App. 3a, 5a.[5]

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[4] An amendment to EAJA addresses Section 406(b)(1)'s prohibition against charging a Title II claimant any fee for representing the claimant in court "except as provided in [Section 406(b)(1)]," 42 U.S.C. 406(b)(1). That amendment provides that Section 406(b)(1) "shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. 2412 note). The amendment also provides that the criminal prohibitions in Section 406(b)(2) "shall not apply with respect to any such award" if, "where the claimant's attorney receives fees for the same work under both [Section 406(b) and Section 2412(d)], the claimant's attorney refunds to the claimant the amount of the smaller fee." *Ibid.*

[5] Petitioner initially sought this Court's review on the question presented in the context of two separate Social Security cases in which he represented claimants Wood and Bill Westfall. Pet. II, 5, 31. Cf. Pet. App. 30a-35a, 36a-57a (fee decisions in Westfall's case). By letter to this Court dated March 30, 2018, petitioner limited his certiorari petition to his attorney's fee request in Wood's case and expressly waived any claim to additional attorney's fees in Westfall's case. This brief therefore addresses the question presented as it arises only in Wood's case.

After SSA denied Wood's disability claim, Wood executed a contingency-fee agreement with petitioner for petitioner's work in her upcoming district court action. Supp. C.A. App. 11. That agreement states that Wood "agrees to pay a fee of 25 percent of the total of the past-due benefits to which [she was] entitled" as payment for "[petitioner's] representation of [her] in Federal Court" if she ultimately succeeds in obtaining such benefits. *Ibid.* The agreement further states that the fees specified therein do "not cover or include [payment for] any representation before the [SSA]." *Ibid.*

Petitioner subsequently represented Wood in district court, where the parties consented to adjudication by a magistrate judge. See Pet. App. 3a, 4a n.2. The magistrate judge reversed the agency decision and remanded for further proceedings. *Id.* at 4a.

b. On remand, SSA awarded Wood a total of $34,383 in past-due disability benefits: $30,871 for herself and $3512 for her child as an auxiliary beneficiary. Pet. App. 4a; see D. Ct. Doc. 27, at 2 (Mar. 29, 2016) (explaining that $3512, not $4340, is the correct amount of auxiliary benefits). The agency withheld a total of 25% of Wood's past-due benefits ($8595.75) from its immediate payment of benefits to cover any direct payment of attorney's fees that might ultimately be warranted. Supp. C.A. App. 14, 18; see Pet. App. 4a. The agency later granted petitioner's fee petition in part, authorizing him to charge Wood $2865 for representing her before the agency under Section 406(a). See Supp. C.A. App. 21; Pet. App. 5a.

c. Meanwhile, in district court, the magistrate judge ordered the government to pay $4107.27 in attorney's fees under EAJA. Pet. App. 4a. Petitioner subsequently moved for a separate award of $4488.48 in attorney's fees under Section 406(b) for representing Wood in court. *Id.*

at 5a. Petitioner calculated the amount of that fee request ($4488.48) by subtracting the EAJA award ($4107.27) from the attorney's fee specified in petitioner's fee agreement for the district court case (25% of Wood's past-due benefits, *i.e.*, $8595.75). Supp. C.A. App. 5.

The magistrate judge awarded $1623.48 in Section 406(b) attorney's fees but otherwise denied petitioner's fee request. Pet. App. 18a-29a. The judge concluded that "the total fee under Sections 406(a) and (b) cannot exceed 25% of the [claimant's] past-due benefits." *Id.* at 21a. The judge also concluded that if a court grants an attorney's fee award under EAJA, the claimant's attorney must refund to the claimant the amount of the EAJA fee or the Section 406(b) fee, whichever is smaller. *Ibid.* In this case, the judge continued, petitioner subtracted the $4107.27 EAJA award from the maximum $8595.75 amount reflecting "25% of [Wood's] past due benefits" but had "erroneously fail[ed] to deduct" the $2865 Section 406(a) fee that SSA had previously approved for petitioner's work before the agency. *Id.* at 22a. The judge thus subtracted the Section 406(a) fee from petitioner's request and awarded him a $1623.48 fee under Section 406(b). *Id.* at 26a, 29a. That amount, the judge noted, was "far less than" amounts approved in other Section 406(b) contexts involving contingent-fee agreements. *Id.* at 28a.

3. Petitioner perfected appeals from the attorney's-fee decisions in four Social Security benefits cases in which he represented the claimants, including Wood. Cf. Pet. App. 1a-2a.[6] The court of appeals consolidated the appeals and affirmed. *Id.* at 1a-17a.

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[6] Although the claimants were named as appellants in each of those appeals, Pet. App. 1a-2a, petitioner was the real party in interest in the appeals because, as their attorney, he sought "to obtain higher fee awards under [Section] 406(b)." *Gisbrecht*, 535 U.S. at

The court of appeals explained that *Dawson* v. *Finch*, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970), was "binding precedent" in the Eleventh Circuit and that *Dawson* held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)." Pet. App. 11a-12a & n.4. Under *Dawson*, the court determined, Section 406(b) "'preclud[es] the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" *Id.* at 12a (quoting *Dawson*, 425 F.2d at 1195).

The court of appeals stated that, in each of the cases before it, the magistrate judge had "relied on *Dawson*," which remained binding on the court of appeals under the "prior panel precedent rule." Pet. App. 12a, 14a. Although the court acknowledged that petitioner had identified decisions from other courts of appeals that "do not apply the 25% limit in [Section] 406(b) to the aggregate fee award under [Section] 406," the court noted that those extra-circuit decisions "either explicitly or implicitly recognize that *Dawson* limited the combined [Section] 406(a) and (b) attorney's fee awards to 25% of past-due benefits" and did "not empower [the panel here] to ignore [*Dawson*'s]" precedential effect. *Id.* at 13a-14a.

DISCUSSION

Petitioner contends (Pet. 15-25) that Section 406(b) —which caps certain attorney's fees at 25% of the claimant's past-due benefits—applies only to the amount of fees for an attorney's representation of the claimant in court proceedings, not on the aggregate amount of fees for representing the claimant in both agency and court

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798 n.6; see Pet. App. 3a n.1. The certiorari petition accordingly names petitioner (and not claimant Wood) as the petitioner before this Court. See Pet. II; cf. p. 7 n.5, *supra*.

proceedings. Petitioner further contends (Pet. 6-15) that the courts of appeals have divided on that question. The government concludes that petitioner is correct on both points, that this Court's review is warranted to resolve the division of authority, and that this case is a suitable vehicle for the Court's review. If the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

1. The court of appeals held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)" and, for that reason, Section 406(b) prohibits "'the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" Pet. App. 11a-12a (citation omitted). That is incorrect. The text of Section 406(b) unambiguously applies its 25% cap only to the amount of attorney's fees for a claimant's "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A). Section 406(b) thus does not restrict fees that may be awarded under Section 406(a) for representing the claimant before the agency or limit the aggregate amount of fees for such representation before the agency and in court. That conclusion is confirmed by the broader statutory context, which demonstrates that attorney's fees for agency proceedings under Section 406(a) can alone exceed 25% of the claimant's past-due benefits so long as such fees are reasonable.

a. i. Section 406(b) applies its 25% cap on attorney's fees only with respect to fees awarded for representing the claimant in court. The relevant portion of Section 406(b) provides:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was *represented before*

> *the court* by an attorney, the court may determine and allow as part of its judgment a *reasonable fee for such representation, not in excess of 25 percent* of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A) (emphasis added). The 25% cap in that passage limits the amount of a "reasonable fee for such representation." "[S]uch representation," in turn, refers directly back to the circumstances of a claimant who was "represented before the court." See *ibid.* Nothing in Section 406(b) addresses attorney's fees for representing a claimant in agency proceedings.

No other plausible construction exists. The adjective "such" is "used to avoid repetition," and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1981). The phrase "such representation" in Section 406(b) thus necessarily refers to the provision's only antecedent reference to representation, namely, the claimant's "represent[ation] before the court" by an attorney. 42 U.S.C. 406(b)(1)(A).

If Congress had intended to apply the limitations in Section 406(b) to fees for representation before SSA, it would have done so expressly. Elsewhere in Section 406, Congress made it quite clear when it intended to address fees for work before the agency. See, *e.g.*, 42 U.S.C. 406(a)(1) (discussing "any claim before the Commissioner" and requiring a "reasonable fee to compensate [an] attorney for the services performed by him in connection with such claim"); *ibid.* (addressing "the maximum fees which may be charged for services performed in connection with any claim before the Commissioner"). Where, as here, "Congress includes particular language in one section of a statute but omits it

in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Moreover, when Congress intended to impose a cap on the aggregate amount of total fees under Section 406, it enacted clear text to set such a limit. Section 406(a) specifically addresses fee agreements for work performed before the agency for a claimant with an OSADI claim under Title II and a separate SSI claim under Title XVI. 42 U.S.C. 406(a)(2)(C). If the claimant prevails on both such claims, Congress directed that the agency approve the fee agreement only if "the *total fee or fees* specified in such agreement does not exceed, in the *aggregate*," $6000. *Ibid.* (emphasis added); see p. 4 n.3, *supra*. Had Congress intended to impose a 25% cap on the "aggregate" amount of fees awarded under Section 406(a) and (b), it would have enacted analogous text.

ii. An aggregate 25% past-due-benefit cap would also be inconsistent with other provisions within Section 406(a).

Congress has required that SSA determine the amount of a "reasonable fee" under Section 406(a)(1)'s fee petition process without imposing any fixed limit on the amount of that fee. 42 U.S.C. 406(a)(1). The only statutory criterion for fixing such a fee is that the fee must be "reasonable." *Ibid.* As a result, so long as a fee for an attorney's work before the agency is "reasonable" under Section 406(a), that fee can exceed 25% of the claimant's past-due benefits.

Section 406(a)'s text governing SSA's payment of an attorney's agency-approved maximum fee directly out of the claimant's past-due benefits confirms that Section 406(a) fees for work before the agency can

exceed 25% of the claimant's past-due benefits. Section 406(a)(4) directs that the agency "shall * * * certify for payment out of such past-due benefits * * * *so much of* the maximum fee *as* does not exceed 25 percent of such past-due benefits. 42 U.S.C. 406(a)(4) (emphasis added). That provision thus reflects that the "reasonable fee" approved by the agency may sometimes exceed 25% of a claimant's past-due benefits, because the provision limits the extent to which the agency may pay an attorney out of those benefits, permitting the agency to pay only "so much of" the approved fee as does not exceed 25% of the past-due benefits. As SSA's publicly available guidance explains, when the "authorized fee exceeds the amount of withheld Title II benefits" for the payment of fees from those benefits, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Nov. 2006).

SSA's longstanding interpretation of Section 406 also reflects that the "reasonable fee" that may be sought by filing an agency fee petition under Section 406(a)(1) is not capped at 25% of past-due benefits. The agency's regulations make clear that the agency may authorize a reasonable fee "even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

Those provisions permitting a fee award under Section 406(a) that *exceeds* 25% of a claimant's past-due benefits confirm that Section 406(b)'s limitation capping fees at 25% of past-due benefits does not apply beyond such fees awarded under Section 406(b) for an attorney's work in court and does not limit the aggregate amount of fees under both Section 406(a) and (b). It would be anomalous to conclude that Congress permitted a "reasonable fee" exceeding 25% of a claimant's

past-due benefits under Section 406(a)(1) for work before the agency but, by virtue of Section 406(b), imposed a cap on the aggregate amount of fees for both the agency and court proceedings equal to *only* 25% of such benefits.

iii. The absence of a statutory cap on the aggregate amount of attorney's fees for agency proceedings (under Section 406(a)) and court proceedings (under Section 406(b)) does not mean that the agency and courts should approve fees that in aggregate total 50% or more of the client's past-due benefits. Although it is "mathematically possible" to produce an aggregate fee of such magnitude without a 25% aggregate cap, such a result should be "unlikely" if the agency and the courts properly discharge their responsibility to "ensur[e] the attorney fee is reasonable." *Wrenn ex rel. Wrenn* v. *Astrue*, 525 F.3d 931, 938 (10th Cir. 2008).

SSA requires that any fee petition seeking a "reasonable fee" for work performed in agency proceedings, 42 U.S.C. 406(a)(1), disclose the amount of any separate fee the representative "wants to request or charge * * * in the same matter before any * * * court." 20 C.F.R. 404.1725(a)(4). The agency then considers that additional fee amount when setting a reasonable agency fee in light of the Social Security program's "purpose" of "provid[ing] a measure of economic security for the beneficiaries." 20 C.F.R. 404.1725(b)(1) and (1)(vii). The agency's authority in the fee-agreement context is more circumscribed, but the maximum contractual fee that it may approve—25% of past-due benefits or $6000, whichever is smaller, 42 U.S.C. 406(a)(2)(A)(ii)—is itself subject to reduction on administrative review if, *inter alia*, that amount is "clearly excessive for [the] services rendered," 42 U.S.C. 406(a)(3)(A).

A court similarly may approve only a "reasonable fee" for an attorney's work before it, 42 U.S.C. 406(b), and may—like the agency—properly consider the total sum that an attorney seeks to charge the client for handling agency and court proceedings on the same claim when exercising its discretion to determine what fee is reasonable under Section 406(b). Even when lawful contingency-fee agreements are implicated, Section 406(b) requires both that attorneys "show that the fee sought is reasonable for the services rendered" and that courts review such fee arrangements "as an independent check, to assure that they yield reasonable results in particular cases" and to make "downward adjustment[s]" when warranted. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 807-808 (2002). The proper exercise of that authority to enforce the reasonableness of fees under Section 406 should avoid excessive charges to Social Security claimants.

b. The court of appeals in this case concluded that it was bound by the Fifth Circuit's decision in *Dawson* v. *Finch*, 425 F.2d 1192, cert. denied, 400 U.S. 830 (1970). See Pet. App. 11a-12a & n.4, 14a. Neither *Dawson* nor the Fourth Circuit's similar decision in *Morris* v. *SSA*, 689 F.2d 495 (1982) (per curiam), provides a sound basis for disregarding Section 406(b)'s unambiguous text.

In *Dawson*, the Fifth Circuit affirmed a district court's decision to award an attorney no fees under Section 406(b) for successfully representing a claimant in court, because SSA had already approved an attorney's fee for administrative proceedings that equaled 25% of the claimant's past-due benefits, which the court understood to constitute the "total fee allowance" in this context. 425 F.2d at 1192. The court of appeals stated that it had considered "[t]he statutory language and legislative history of Section [4]06(b)," *id.* at 1195, and it block-quoted the relevant

statutory text, which applies when a court enters a judgment favorable to a claimant "'who was represented before the court by an attorney'" and which caps the amount of a reasonable fee "'for such representation'" at 25% of the past-due benefits, *id.* at 1193 (quoting 42 U.S.C. 406(b)). But *Dawson* did not set forth any textual analysis that might have arguably supported its holding. See *id.* at 1193-1195. *Dawson* merely noted that the attorney seeking fees had not "discussed the statutory language" in arguing for his contrary position. *Id.* at 1195.

Dawson relied heavily on congressional testimony preceding Section 406(b)'s enactment in 1965 in which an official of the Department of Health, Education, and Welfare (which was then responsible for administering the Social Security Act) noted an "occasion[al]" problem of "what appeared to be inordinately large fees for representing claimants *in Federal district court actions* arising under the social security program." 425 F.2d at 1194 (emphasis added; citation omitted). But that testimony does not reflect that Section 406(b) imposes a cap on the *aggregate* amount of fees for both administrative and court proceedings. The text of Section 406(b), like that testimony, targets only attorney's fees for representation in court proceedings.

The Fourth Circuit's per curiam decision in *Morris* likewise offered no sound basis for concluding that Section 406 "limits the aggregate attorney's fees recoverable to twenty-five percent of the claimant's past-due benefits." 689 F.2d at 496. *Morris* rested its decision on an inference it derived from Section 406(a) and (b). First, *Morris* determined that Section 406(b) imposes a 25% cap on the amount of attorney's fees that "courts [may] authorize[]." *Id.* at 497. Second, *Morris* determined that Section 406(a) also prohibits SSA from "approv[ing] an

attorney's fee in excess of twenty-five percent," apparently based on statutory text—now amended and relocated to Section 406(a)(4)—stating that the agency "'shall . . . certify for payment (out of [the claimant's] past-due benefits)'" up to "'25 per centum of the total amount of such past-due benefits.'" *Id.* at 497 & n.1 (quoting 42 U.S.C. 406(a) (1976)); see *id.* at 496. *Morris* then concluded that "the most reasonable inference to be drawn" from the purported 25% caps in both Section 406(a) and (b) was that Congress intended an aggregate 25% cap "to establish a ceiling for attorney's fees that was independent of the course of the proceedings." *Id.* at 497-498.

That inference-based analysis does not purport to ground an aggregate 25% fee cap in any statutory text directly establishing such a limit and, for the reasons previously discussed, that atextual reading is incorrect. Moreover, *Morris* is flawed even on its own terms. *Morris* erroneously conflated SSA's determination of a reasonable fee for agency proceedings under Section 406(a) with the agency's separate certification under Section 406(a) of a direct "payment" to the attorney for (some or all of) the approved fee, deeming the latter to impose a cap on the former. See *Clark* v. *Astrue*, 529 F.3d 1211, 1217-1218 (9th Cir. 2008) (criticizing this error). As such, the Fourth Circuit's inferential logic is flawed because it rests on a mistaken understanding of Section 406(a). See *ibid.*

2. a. Petitioner contends (Pet. 6-15) that *Dawson*, *Morris*, and the Eleventh Circuit's decision in this case reflect a longstanding and acknowledged division of authority in which the Sixth, Ninth, and Tenth Circuits have reached conflicting results. The government agrees. Since 1982, the courts of appeals that have interpreted the relevant provisions of Section 406 without relevant binding circuit precedent have concluded—contrary to

Dawson, *Morris*, and the decision below—that Section 406 does not impose any aggregate cap on attorney's fees for agency and court proceedings.

First, in *Horenstein* v. *Secretary of Health & Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc), the government successfully petitioned the en banc Sixth Circuit to overturn the court's earlier decision in *Webb* v. *Richardson*, 472 F.2d 529 (6th Cir. 1972), which had held that only one tribunal may award fees under Section 406 and that the resulting fee award for administrative and court proceedings was subject to a "blanket 25 percent cap." *Horenstein*, 35 F.3d at 262; see *id.* at 261. The government argued, *inter alia*, that "*Webb's* 25% cap conflicts with [S]ection 406(a)(1)," because "[S]ection 406(a)(1) contains no limitation on the amount of the reasonable fee" that SSA may approve for work before the agency and permits such a fee even if the claimant is not awarded any "past-due benefits." Gov't Br. and Suggestion of Initial Hr'g En Banc at 17-18, *Horenstein*, *supra* (Nos. 90-4028, 92-4302).

The en banc Sixth Circuit agreed with that position. *Horenstein*, 35 F.3d at 262-263. The court concluded that Section 406(a)(1) allows the agency to specify the "'reasonable fee' for work done before the [agency]," imposes "no requirement that such an award be made from past-due benefits," and is not restricted by Section 406(b)'s 25% limitation for "services performed in a federal court." *Id.* at 262. *Horenstein* further determined that in contexts in which "the court remands the case" to the agency, the court may award a fee up "to 25 percent of past-due benefits" "for the work performed before it" and, *in addition*, the agency may "award whatever fee [it] deems reasonable for the work performed on remand and prior administrative proceedings." *Ibid.* The court

accordingly overturned "*Webb*'s blanket 25 percent cap" and the associated "single tribunal rule" on the ground that both violated the terms of Section 406. *Id.* at 263.

In 2008, the Ninth and Tenth Circuits similarly held that Section 406 does not impose a cap on the aggregate amount of attorney's fees that may be approved for work in administrative and court proceedings. *Clark*, *supra* (9th Cir.); *Wrenn*, *supra* (10th Cir.). The Tenth Circuit reasoned that a 25% past-due-benefits cap on the "combined [amount of] attorney fees" was inconsistent with the "clear and unambiguous" text of Section 406(a) and (b), which grants the agency and a court "authority to independently determine the appropriate attorney fees" for the administrative and court proceedings, subject to distinct statutory requirements in Section 406(a) and (b). *Wrenn*, 525 F.3d at 932, 936-937.

The Ninth Circuit has "follow[ed] the Sixth and Tenth Circuits" by holding that "the plain text of [Section] 406(b) limits only the amount of attorney's fees awarded under [Section] 406(b)" for work done "in federal district court" —"not the combined fees" for work done before the agency and the court. *Clark*, 529 F.3d at 1213, 1215. The court reasoned that because "[t]he phrase 'such representation' [in Section 406(b)(1)] refers to representation 'before the court,'" Section 406(b)'s 25% cap limits "attorney's fees only for representation before the court, not before the [agency]." *Id.* at 1215 (quoting 42 U.S.C. 406(b)(1)). The court also reasoned that an aggregate 25% cap was inconsistent with Section 406(a)(1), because that provision authorizes SSA to approve fees for agency proceedings "in any amount—including amounts greater than 25% of past-due benefits—so long as the fees are 'reasonable.'" *Id.* at 1216.

b. *Horenstein*, *Wrenn*, and *Clark* cannot be reconciled with *Dawson*, *Morris*, and the decision of the court of appeals in this case. Certiorari is warranted to resolve that division of authority over whether Section 406 imposes a 25% past-due-benefits cap on the aggregate amount of attorney's fees that may be charged for representing a Social Security claimant before the agency and in court.

The question presented is significant and frequently recurring. In the fiscal year ending September 30, 2017 alone, over 10,000 new Social Security cases under Title II and nearly 9000 new SSI cases under Title XVI were filed in federal court. Admin. Office of the U.S. Courts, *Civil Judicial Business* Tbl. C-2A, at 4 (Sept. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2017.pdf. Moreover, unlike other contexts in which questions of attorney compensation are normally resolved between attorneys and their clients, attorneys must seek compensation for their work on Social Security matters through Section 406 because they are prohibited by law from knowingly charging a fee for Title II (and Title XVI) cases exceeding that authorized under Section 406. See 42 U.S.C. 406(a)(5) and (b)(2), 1383(d)(2)(A); see also p. 2 n.2, *supra*. Although the financial stake in any one case is relatively low when compared to business litigation, the question whether fees governed by Section 406(a) and (b) are subject to an aggregate 25% cap must be regularly addressed in the Social Security context.

This Court has previously granted review to resolve a similar division of authority in the same context concerning "the appropriate method of calculating fees under [Section] 406(b)." *Gisbrecht*, 535 U.S. at 799. The Court should follow the same course here. The petition for a writ of certiorari—as limited by petitioner, see p. 7 n.5, *supra*—squarely and cleanly presents the

question presented, which warrants the Court's plenary review.

3. Finally, the government acknowledges that it has participated as a party in the conflicting appellate decisions and that it has been on both sides of the issue. After *Dawson* (1970) and *Morris* (1982) announced a 25% cap on the aggregate amount of fees under Section 406, the government sought—and successfully obtained—en banc review in *Horenstein* (1994) based on arguments logically inconsistent with the existence of a 25% cap on such aggregate attorney's fees. See *Horenstein*, 35 F.3d at 261-262; cf. 28 C.F.R. 0.20(b); see pp. 19-20, *supra*. By 2007, however, the government as the appellee in *Wrenn* and *Clark* defended an overall 25% cap. See *Wrenn*, 525 F.3d at 935-936; see also Gov't C.A. Br. at 16-23, *Clark*, *supra* (No. 07-35056) (available at 2007 WL 2414560). The government subsequently took the same position as appellee in this case, albeit based on *Dawson*'s binding precedential force in the Eleventh Circuit. Gov't C.A. Br. 26, 29 & n.8, 33-35.

The government has now reconsidered its position in light of the certiorari petition. The government concludes that the position that it advocated to the en banc court in *Horenstein* is correct and that, for the reasons above, Section 406 does not impose an overall cap on the aggregate amount of attorney's fees for agency and court proceedings under Title II of the Social Security Act. For that reason, if the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2018

No. 17-773

In the Supreme Court of the United States

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

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QUESTION PRESENTED

Whether 42 U.S.C. 406(b)(1)(A) establishes that 25% of a claimant's past-due benefits under Title II of the Social Security Act is the maximum aggregate amount of attorney's fees that may be charged for representing the claimant in both administrative and court proceedings under Title II.

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BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 861 F.3d 1197. The order of the district court (Pet. App. 18a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2017. On September 15, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 23, 2017, and the petition was filed on November 21, 2017. The petition for a writ of certiorari was granted on May 21, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

A. Statutory Background

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain individuals eligible for such benefits under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability [OASDI] benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental security income (SSI) benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75. A claimant's application for benefits can result in payments of "[p]ast-due benefits"—*i.e.*, benefits that may accrue before a favorable determination or decision, 20 C.F.R. 404.1703, 416.1503—as well as ongoing monthly benefits. See 42 U.S.C. 423(a), 1382. A claimant may seek administrative review of SSA's initial determination, including any denial of benefits to which she may be entitled, 42 U.S.C. 405(b), 1383(c)(1) and (2), and may then seek judicial review of the resulting final agency decision, 42 U.S.C. 405(g), 1383(c)(3).

Title II of the Social Security Act separately regulates the amount of fees that an attorney may collect from an OASDI claimant for representing the claimant in agency proceedings, 42 U.S.C. 406(a), and on judicial review, 42 U.S.C. 406(b). See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 793-794 (2002).[1] "Collecting or even demanding from the

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[1] Title XVI of the Act incorporates most of the attorney's fee provisions for agency and court proceedings in Section 406(a) and (b),

client anything more than the authorized [fee for such representation] is a criminal offense." *Id.* at 796; see 42 U.S.C. 406(a)(5) and (b)(2). The question presented in this case is whether Section 406(b)(1)(A) establishes that 25% of the claimant's past-due benefits is the maximum aggregate amount of fees an attorney may charge for representing a claimant in both administrative and court proceedings under Title II.

1. Fees for Administrative Proceedings

Under Title II, an attorney may seek fees "[f]or representation of a benefits claimant at the administrative level" by either filing "a fee petition" with SSA under Section 406(a)(1) or seeking SSA's approval of a "fee agreement" with the claimant under Section 406(a)(2). *Gisbrecht*, 535 U.S. at 794.

a. Fee petitions under Section 406(a)(1)

Section 406(a)(1) provides that "[t]he Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any [Title II] claim before the Commissioner." 42 U.S.C. 406(a)(1). Section 406(a)(1) further provides that, except as provided in Section 406(a)(2) with respect to fee agreements, "whenever the Commissioner of Social Security * * * makes a determination favorable to the claimant" on "any claim before the Commissioner for benefits under [Title II]" in which the claimant was represented by an attorney, "the Commissioner shall * * * fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim." *Ibid.*

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with modifications for SSI cases, 42 U.S.C. 1383(d)(2)(A), and separately addresses payment of such fees from past-due SSI benefits, 42 U.S.C. 1383(d)(2)(B). Title XVI fees are not at issue in this case.

SSA's implementing regulations require the claimant's representative to submit a "written request" for "approval of a fee for services * * * performed in dealings with [the agency]," which the representative should file with the agency "after the proceedings * * * are completed." 20 C.F.R. 404.1725(a). That fee petition must include, *inter alia*, a list of the services provided, the amount of time spent on each type of service, and the amount of the fee that the representative seeks to charge for those services. 20 C.F.R. 404.1725(a)(2)-(3). In fixing the amount of a reasonable fee, the agency will "consider the amount of benefits, if any, that are payable," but the agency will ultimately "base the amount of fee [it] authorize[s]" on multiple factors and "may authorize a fee even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

b. Fee agreements under Section 406(a)(2)

In 1990, Congress enacted Section 406(a)(2), which establishes an alternative, "streamlined process for a representative to obtain approval of [a] fee" for "representing a claimant before the agency" based on a written fee agreement. 74 Fed. Reg. 6080 (Feb. 4, 2009). A representative may invoke that process under Title II by "present[ing] in writing" to the agency "an agreement between the claimant" and the representative "prior to the time of the Commissioner's determination." 42 U.S.C. 406(a)(2)(A). If the Commissioner's determination is "favorable to the claimant" on a "claim of entitlement to past-due benefits" and "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of such past-due benefits" or a prescribed dollar amount (currently $6000), see 42 U.S.C. 406(a)(2)(A)(ii) and (iii), the Commissioner "shall approve" the agreement "at the time of the favorable determination" and "the fee specified in the agreement shall be the maximum fee."

42 U.S.C. 406(a)(2)(A). Cf. 42 U.S.C. 406(a)(3)(A)-(C) (addressing administrative review of a fee initially approved based on a fee agreement).[2]

In a case involving a fee "agreement described in [Section 406(a)(2)](A)" that relates to both a claim for past-due OASDI benefits (under Title II) and a claim for past-due SSI benefits (under Title XVI), Section 406(a)(2) imposes an additional requirement when the Commissioner makes "a favorable determination * * * with respect to both such claims." 42 U.S.C. 406(a)(2)(C). The Commissioner "may approve" such an agreement "only if the total fee or fees specified in [the] agreement" for representing the claimant before the agency on his Title II and Title XVI claims "does not exceed, in the aggregate, the [$6000] amount" noted above. *Ibid.*; see 42 U.S.C. 406(a)(2)(A)(ii)(II); p. 5 n.2, *supra*.

2. Fees for Court Proceedings

If a claimant seeks judicial review of a final SSA decision, see 42 U.S.C. 405(g) (providing for judicial review), two distinct provisions address attorney's fees for services performed on judicial review: Section 406(b) and a provision of the Equal Access to Justice Act (EAJA) that applies to "civil action[s]" for judicial review, 28 U.S.C. 2412(d). Section 406(b) regulates what the claimant's attorney may charge his own client, see 42 U.S.C. 406(b)(1)(A); see also 42 U.S.C. 406(b)(2), whereas EAJA authorizes a fee-shifting award against the government to reimburse a prevailing party for reasonable fees, see 28 U.S.C. 2412(d)(1)(A) and (2)(A).

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[2] Congress has authorized the Commissioner to "increase the dollar amount under [Section 406(a)(2)(A)](ii)(II)" to reflect "the rate of increase in primary insurance amounts" after January 1, 1991. 42 U.S.C. 406(a)(2)(A). In 2009, the Commissioner increased the prescribed amount to $6000. 74 Fed. Reg. at 6080.

a. Fees under Section 406(b)

Section 406(b) provides in pertinent part:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A). "[N]o other fee may be payable * * * for such representation except as provided in [Section 406(b)(1)]," *ibid.*, or EAJA. See pp. 7-8 & n.4, *infra*.

b. EAJA fees under Section 2412(d)

EAJA Section 2412(d) separately authorizes a court reviewing SSA's final decision to order the recovery of "reasonable attorney fees" from the government in certain circumstances in which such fees were "incurred by [the prevailing claimant] in [the] civil action" and the government's position was not "substantially justified." 28 U.S.C. 2412(d)(1)(A) and (2)(A).[3]

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[3] Although a separate EAJA provision authorizes an award of attorney's fees incurred in an adversary agency adjudication, 5 U.S.C. 504(a)(1), that provision does not apply to Social Security proceedings, which are not adversarial because the agency does not participate as a party to the proceedings. *Sullivan* v. *Hudson*, 490 U.S. 877, 891 (1989).

In circumstances not presented here, EAJA's fee provisions for "civil action[s]," 28 U.S.C. 2412(d)(1)(A), authorize a district court to order the government to pay attorney's fees incurred in certain remand proceedings before SSA. See *Hudson*, 490 U.S. at 890, 892. An EAJA fee award for work before the agency is available only if a district court remands the matter to SSA pursuant to sentence six of 42 U.S.C. 405(g), which applies "in only two situations: where the Secretary requests a remand before answering the complaint, or

In this case, as in most actions for judicial review of OASDI decisions in which the claimant is successful, the district court entered its judgment pursuant to sentence four of 42 U.S.C. 405(g). See J.A. 11. Under sentence four, a court reviews "'each final decision of the Secretary'" in "'a separate piece of litigation'" that "'terminates'" upon entry of a "judgment reversing the Secretary's denial of benefits." *Shalala* v. *Schaefer*, 509 U.S. 292, 299, 302 (1993) (citation, emphasis, and brackets omitted). A claimant who obtains a sentence-four judgment that orders a remand to SSA qualifies as a "prevailing party" under EAJA Section 2412(d) even before SSA makes a final benefits decision on remand, because a judgment of reversal under Section 405(g) reflects sufficient success in the claimant's civil action to confer "prevailing party" status under EAJA. *Id.* at 300-302.

If a court awards fees under EAJA and approves fees under Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee,'" which can "effectively increase[] the portion of past-due benefits the successful Social Security claimant may

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where new, material evidence is adduced that was for good cause not presented before the agency." *Shalala* v. *Schaefer*, 509 U.S. 292, 297 n.2 (1993); see *id.* at 300 n.4 ("limiting *Hudson*['s interpretation of Section 2412(d)] to sentence-six cases"). A sentence-six remand allows the district court to "'retain[] continuing jurisdiction over the case pending [the agency proceedings on remand]'" and then to enter its "judgment after [such] postremand agency proceedings have been completed." *Id.* at 297, 299 (citation and emphasis omitted). In that context, this Court has determined that "the [agency] proceedings on remand [can be deemed] an integral part of the 'civil action' for judicial review" for purposes of a fee award under Section 2412(d). *Hudson*, 490 U.S. at 892.

pocket." *Gisbrecht*, 535 U.S. at 796 (citation omitted; first set of brackets in original).[4]

3. Direct Payment to an Attorney for the Claimant's Fee Obligation Out of the Claimant's Past-Due Benefits

Section 406(a) and Section 406(b) include separate provisions granting SSA "withholding authority to pay attorney's fees" that have been approved for, respectively, "Title II administrative proceedings" and "judicial proceedings under Title II," out of the past-due benefits that are owed to the claimant. *Galbreath*, 485 U.S. at 76; see 42 U.S.C. 406(a)(4) and (b)(1)(A); cf. 42 U.S.C. 406(e)(1) (identifying such provisions as "fee withholding procedures").

a. If SSA has approved a maximum attorney's fee under either the fee-petition or fee-agreement process in Section 406(a) for work before the agency and the claimant is "entitled to past-due benefits under [Title II]," the claimant's attorney may obtain payment of some or all of the approved fee directly from the government out of the

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[4] An amendment to EAJA addresses Section 406(b)(1)'s prohibition against charging a Title II claimant any fee for representing the claimant in court "except as provided in [Section 406(b)(1)]," 42 U.S.C. 406(b)(1). That amendment provides that Section 406(b)(1) "shall not prevent an award of fees and other expenses under [EAJA] [S]ection 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. 2412 note). The amendment also provides that Section 406(b)(2)—which makes it a criminal offense to charge, demand, receive, or collect a fee for "proceedings before a court * * * in excess of that allowed" under Section 406(b)(1), see 42 U.S.C. 406(b)(2)—"shall not apply with respect to any such award" if, "where the claimant's attorney receives fees for the same work under both [Section 406(b) and EAJA], the claimant's attorney refunds to the claimant the amount of the smaller fee." § 3(2), 99 Stat. 186.

claimant's past-due benefits. 42 U.S.C. 406(a)(4). Section 406(a)(4) provides that, in such circumstances, the Commissioner "shall * * * certify for payment" to the attorney "out of [the] past-due benefits * * * an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits" (minus an assessment charged to the attorney for the direct payment). *Ibid.*; see 20 C.F.R. 404.1730(b)(1) and (d); cf. 42 U.S.C. 406(d) (assessment). SSA will therefore pay an attorney out of those past-due benefits "the smaller of" the "amount of the fee" set by the agency or "[25%] of the total of the past due benefits" (minus the assessment). 20 C.F.R. 404.1730(b)(1) and (d). SSA's Program Operations Manual System (POMS) explains that "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA can pay directly to the representative, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Mar. 28, 2013), http://policy.ssa.gov/poms.nsf/lnx/0203920017.[5]

b. If the district court has allowed a reasonable fee as part of its judgment under Section 406(b)(1)(A), the Commissioner also "may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of [the claimant's] past-due benefits" (minus an assessment for the direct payment). 42 U.S.C. 406(b)(1)(A); see 20 C.F.R. 404.1728(b), 404.1730(a); cf. 42 U.S.C. 406(d) (assessment). That direct payment "is subject to the [same] limitations" that govern the direct payment of fees approved by SSA. 20 C.F.R. 404.1730(a). The POMS explain that although "[t]he court fee is in

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[5] The POMS are SSA's "publicly available operating instructions for processing Social Security claims." *Washington Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003).

addition to the fee, if any, SSA authorizes for proceedings at the administrative level," the agency will only "withhold[] a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both." POMS, GN 03920.017D.5 Note 1.

B. Proceedings In This Case

1. a. In 2008, claimant Katrina Wood filed a Title II application for disability benefits, which SSA denied. See Administrative Record (A.R.) 13 (Aug. 30, 2012). Wood then entered into a fee agreement with an attorney who initially represented her in administrative proceedings. A.R. 44. In December 2010, after an administrative law judge (ALJ) determined that Wood was not disabled, A.R. 10-21, Wood designated petitioner as her attorney for further agency review proceedings before SSA's Appeals Council. A.R. 9. In April 2012, the Appeals Council denied review. A.R. 4A-6.

In June 2012, Wood entered into a contingency-fee agreement with petitioner for the upcoming district court action. J.A. 8-10. That agreement states that Wood "agrees to pay a fee of 25 percent of the total of the past-due benefits to which [she] is entitled" as payment for "[petitioner's] representation of [her] in Federal Court" if she succeeds in obtaining such benefits. J.A. 8-9. The fee agreement further states that its provisions do "not cover or include any representation before [SSA]." J.A. 9.

Petitioner subsequently represented Wood in district court, where the parties consented to adjudication by a magistrate judge. See Pet. App. 3a, 4a n.2. In September 2013, the magistrate judge reversed the agency decision and entered judgment remanding the matter for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). Pet. App. 4a; J.A. 11. One month later, the magistrate judge granted Wood's unopposed motion for $4107.27 in

EAJA fees under Section 2412(d) for petitioner's work in district court. J.A. 12-15; see Pet. App. 4a.

b. On remand, SSA awarded Wood a total of $34,383 in past-due disability benefits: $30,871 for herself and $3512 for her child as an auxiliary beneficiary. Pet. App. 4a; J.A. 19; see D. Ct. Doc. 27, at 2 (Mar. 29, 2016) (explaining that $3512, not $4340, is the correct amount of past-due auxiliary benefits). The agency withheld a total of 25% of Wood's past-due benefits ($8595.75) from its immediate payment of benefits, to cover any direct payment of attorney's fees that might ultimately be warranted. J.A. 19, 30; see Pet. App. 4a. The agency separately granted petitioner's Section 406(a) fee petition in part, authorizing petitioner to charge Wood $2865 for representing her before the agency. See J.A. 25-26; Pet. App. 5a.

c. Petitioner then moved the district court for a separate $4488.48 fee award under Section 406(b) for representing Wood before the court. Pet. App. 5a. Petitioner calculated the amount of that Section 406(b) fee request ($4488.48) by subtracting the EAJA award ($4107.27) from the 25% contingency fee specified in petitioner's fee agreement for the district court litigation ($8595.75). Supp. C.A. App. 5. That $4488.48 fee request under Section 406(b) was therefore mathematically equivalent to requesting approval of the full 25% of past-due benefits specified in the fee agreement for the district court case ($8595.75) and refunding to Wood the smaller EAJA fee ($4107.27).

The magistrate judge awarded $1623.48 in Section 406(b) attorney's fees but otherwise denied petitioner's fee request. Pet. App. 18a-29a. The judge concluded that "the total fee under Sections 406(a) and (b) cannot exceed 25% of the [claimant's] past-due benefits." *Id.* at 21a. The judge also concluded that if a court grants a fee award

under EAJA, the claimant's attorney must refund to the claimant the amount of the EAJA fee or the Section 406(b) fee, whichever is smaller. *Ibid.* In this case, the judge continued, petitioner properly subtracted the $4107.27 EAJA award from the maximum $8595.75 amount reflecting "25% of [Wood's] past due benefits" but had "erroneously fail[ed] to deduct" the $2865 Section 406(a) fee that SSA had previously approved for petitioner's work before the agency. *Id.* at 22a. The judge therefore subtracted the Section 406(a) fee from petitioner's request and awarded him a $1623.48 fee under Section 406(b). *Id.* at 26a, 29a. That amount, the judge noted, was "far less than" amounts approved in other Section 406(b) contexts involving contingent-fee agreements. *Id.* at 28a.

SSA fees: Section 406(a)	$2865.00 (8.3%)[6]	$2865.00 (8.3%)
Court fees:	*Requested*	*Awarded*
EAJA	$4107.27	$4107.27
Section 406(b)	$4488.48	$1623.48
Subtotal:	$8595.75 (25.0%)	$5720.75 (16.7%)
Total fees:	$11,460.75 (33.3%)	$8595.75 (25.0%)

2. Petitioner perfected appeals from the attorney's-fee decisions in four Social Security benefits cases in which he represented the claimants, including Wood. See

[6] The percentage indicated is the percentage of total past-due benefits ($34,383) represented by each associated amount in the chart.

Pet. App. 1a-2a.[7] The court of appeals consolidated the appeals and affirmed. *Id.* at 1a-17a.

The court of appeals explained that *Dawson* v. *Finch*, 425 F.2d 1192 (5th Cir.), cert. denied, 400 U.S. 830 (1970), was "binding precedent" in the Eleventh Circuit and that *Dawson* held that "the 25% limit from [Section] 406(b) applies to total fees awarded under both [Section] 406(a) and (b)." Pet. App. 11a-12a & n.4. Under *Dawson*, the court determined, Section 406(b) "'preclud[es] the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" *Id.* at 12a (quoting *Dawson*, 425 F.2d at 1195).

The court of appeals stated that, in each of the cases before it, the magistrate judge had "relied on *Dawson*," which remained binding on the court of appeals under the "prior panel precedent rule." Pet. App. 12a, 14a. Although the court acknowledged that petitioner had identified decisions from other courts of appeals that "do not apply the 25% limit in [Section] 406(b) to the aggregate fee award under [Section] 406," the court noted that those out-of-circuit decisions "either explicitly or implicitly recognize that *Dawson* limited the combined [Section] 406(a) and (b) attorney's fee awards to 25% of past-due benefits" and did "not empower [the panel here] to ignore [*Dawson*'s]" precedential effect. *Id.* at 13a-14a.

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[7] Although the claimants were named as appellants in each of those appeals, Pet. App. 1a-2a, petitioner was the real party in interest in the appeals because, as their attorney, he sought "to obtain higher fee awards under [Section] 406(b)." *Gisbrecht*, 535 U.S. at 798 n.6; see Pet. App. 3a n.1.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 406(b) imposes a 25% cap on the aggregate amount of attorney's fees that may be approved for work before SSA and before the court. Section 406(b)'s text plainly imposes that 25% limitation only upon the amount of fees allowed for the claimant's "represent[ation] *before the court*." 42 U.S.C. 406(b)(1)(A) (emphasis added). That text fully resolves this case. The surrounding statutory context confirms that conclusion. Whereas Section 406(b) governs the amount of fees that may be charged for representing a plaintiff in court, Section 406(a) imposes distinct limits on the amount of fees that may be charged for work before the agency. Among other things, Section 406(a) authorizes SSA to approve fees for work before the agency that by themselves *exceed* 25% of a claimant's past-due benefits. Section 406(b)'s 25% cap thus logically could apply only to fees for court proceedings, not the aggregate total of fees for agency and court proceedings.

The absence of a 25% cap on the aggregate amount of attorney's fees for agency and court proceedings does not mean that attorney's fees should normally total 50% or more of a claimant's past-due benefits. SSA may properly consider the total amount of agency and court fees requested when determining the proper amount of fees for work before the agency. The district court likewise should serve as an "independent check" against excessive fees, *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 807 (2002), when it determines a reasonable fee for work on judicial review. Congress itself established those distinct limitations on the amount of fees that may be charged to an SSA claimant, which should allow sufficient fees to attract the

attorneys needed by SSA claimants while ensuring that such fees are not themselves excessive.

ARGUMENT

THE COURT OF APPEALS ERRED BY IMPOSING A 25% CAP ON THE AGGREGATE AMOUNT OF ATTORNEY'S FEES FOR AGENCY AND COURT PROCEEDINGS

The court of appeals held that "the 25% limit from [42 U.S.C.] 406(b) applies to total fees awarded under both [42 U.S.C.] 406(a) and (b)" and, for that reason, Section 406(b) prohibits "'the *aggregate* allowance of attorney's fees greater than 25 percent of the [claimant's] past due benefits.'" Pet. App. 11a-12a (citation omitted). That is incorrect. The text of Section 406(b) unambiguously applies its 25% cap only to the amount of attorney's fees for a claimant's "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A). Section 406(b) thus does not restrict fees that may be awarded under Section 406(a) for representing the claimant before the agency or limit the aggregate amount of fees for such representation before the agency and in court. That conclusion is confirmed by the broader statutory context, which demonstrates that attorney's fees for agency proceedings under Section 406(a) can alone exceed 25% of the claimant's past-due benefits so long as such fees are reasonable.

A. Section 406(b) Caps The Amount Of Attorney's Fees Only For Work In Court Proceedings

1. The text of Section 406(b) applies only to attorney's fees for representation in court

Section 406(b) imposes a 25% cap on attorney's fees only with respect to fees awarded for representing the claimant in court. The relevant portion of Section 406(b) provides:

> Whenever a court renders a judgment favorable to a claimant under [Title II] who was *represented before the court* by an attorney, the court may determine and allow as part of its judgment a *reasonable fee for such representation, not in excess of 25 percent* of the total of the past-due benefits to which the claimant is entitled by reason of such judgment.

42 U.S.C. 406(b)(1)(A) (emphasis added). The 25% cap in that passage limits the amount of a "reasonable fee for such representation." "[S]uch representation," in turn, refers directly back to the claimant's "represent[ation] before the court." See *ibid.* Nothing in Section 406(b) addresses attorney's fees for representing a claimant in agency proceedings.

No other plausible construction exists. The adjective "such" is "used to avoid repetition," and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1981). The phrase "such representation" in Section 406(b) thus necessarily refers to the provision's only antecedent reference to representation, namely, the claimant's "represent[ation] before the court" by an attorney. 42 U.S.C. 406(b)(1)(A).

If Congress had intended to apply the limitations in Section 406(b) to fees for representation before SSA, it would have done so expressly. Elsewhere in Section 406, Congress made it quite clear when it intended to address fees for work before the agency. See, *e.g.*, 42 U.S.C. 406(a)(1) (discussing "any claim before the Commissioner" and requiring a "reasonable fee to compensate [an] attorney for the services performed by him in connection with such claim"); *ibid.* (addressing "the maximum fees which may be charged for services per-

formed in connection with any claim before the Commissioner"). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Moreover, when Congress intended to impose a cap on the aggregate amount of total fees under Section 406, it enacted clear text to set such a limit. Section 406(a) specifically addresses fee agreements for work performed before the agency for a claimant with both an OASDI claim under Title II and a separate SSI claim under Title XVI. 42 U.S.C. 406(a)(2)(C). If the claimant prevails on both such claims, Congress directed that the agency approve the fee agreement only if "the *total fee or fees* specified in such agreement does not exceed, in the *aggregate*," $6000. *Ibid.* (emphasis added); see p. 5 n.2, *supra*. Had Congress intended to impose a 25% cap on the "aggregate" amount of fees awarded under Section 406(a) and (b), it would have enacted analogous text.

2. The surrounding statutory context confirms that Section 406(b) does not restrict attorney's fees for agency proceedings

An aggregate 25% past-due-benefits cap would also be inconsistent with the broader structure of Section 406.

Congress has required that SSA determine the amount of a "reasonable fee" under Section 406(a)(1)'s fee petition process without imposing any fixed limit on the amount of that fee. 42 U.S.C. 406(a)(1). The only statutory criterion for fixing such a fee is that the fee must be "reasonable." *Ibid.* As a result, so long as a fee

for an attorney's work before the agency is "reasonable" under Section 406(a), that fee can exceed 25% of the claimant's past-due benefits.

Section 406(a)'s text governing SSA's payment of an attorney's agency-approved maximum fee directly out of the claimant's past-due benefits confirms that Section 406(a) fees for work before the agency can exceed 25% of the claimant's past-due benefits. Section 406(a)(4) directs that the agency "shall * * * certify for payment out of such past-due benefits * * * *so much of* the maximum fee *as* does not exceed 25 percent of such past-due benefits. 42 U.S.C. 406(a)(4) (emphasis added). That provision thus reflects that the "reasonable fee" approved by the agency may sometimes exceed 25% of a claimant's past-due benefits, because it limits the extent to which the agency may pay an attorney out of those benefits, permitting the agency to pay only "so much of" the approved fee as does not exceed 25% of the past-due benefits. SSA's regulations likewise state that SSA may pay out of past-due benefits only "the smaller of" the fee approved by the agency or 25% of such benefits. 20 C.F.R. 404.1730(b)(1). SSA's publicly available guidance accordingly explains that when the "authorized fee exceeds the amount of withheld Title II benefits" for the payment of fees from those benefits, "the representative must collect the balance from the claimant." POMS, GN 03920.017D.1 (Mar. 28, 2013).

SSA's longstanding interpretation of Section 406 further reflects that the "reasonable fee" that may be sought by filing an agency fee petition under Section 406(a)(1) is not capped at 25% of past-due benefits. The agency's regulations make clear that the agency may authorize a reasonable fee "even if no benefits are payable." 20 C.F.R. 404.1725(b)(2).

Those provisions permitting a fee award under Section 406(a) that *exceeds* 25% of a claimant's past-due benefits confirm that Section 406(b)'s limitation capping fees at 25% of past-due benefits does not apply beyond fees awarded under Section 406(b) for an attorney's work in court and does not limit the aggregate amount of fees under both Section 406(a) and (b). It would be anomalous to conclude that Congress permitted a "reasonable fee" exceeding 25% of a claimant's past-due benefits under Section 406(a)(1) for work before the agency but, by virtue of Section 406(b), imposed a cap on the *aggregate* amount of fees for both the agency and court proceedings equal to *only* 25% of such benefits.

3. No sound basis exists for disregarding Section 406(b)'s unambiguous text

The court of appeals in this case did not independently analyze whether Section 406(b)'s text caps the aggregate amount of fees for both agency and court proceedings. The court instead concluded that it was bound by the Fifth Circuit's precedent in *Dawson* v. *Finch*, 425 F.2d 1192, cert. denied, 400 U.S. 830 (1970), even if "*Dawson* was wrongly decided." Pet. App. 14a; see *id.* at 11a-12a & n.4, 13a-14a. Neither *Dawson* nor the Fourth Circuit's similar decision in *Morris* v. *SSA*, 689 F.2d 495 (1982) (per curiam), provides a sound basis for disregarding Section 406(b)'s unambiguous text.

In *Dawson*, the Fifth Circuit affirmed a district court's decision to award an attorney no fees under Section 406(b) for successfully representing a claimant in court, because SSA had already approved an attorney's fee for administrative proceedings that equaled 25% of the claimant's past-due benefits, which the court understood to constitute the "total fee allowance" in this context. 425 F.2d at 1192. The court of appeals stated that it had considered

"[t]he statutory language and legislative history of Section [4]06(b)," *id.* at 1195, and it block-quoted the relevant statutory text, which applies when a court enters a judgment favorable to a claimant "'who was represented before the court by an attorney'" and which caps the amount of a reasonable fee "'for such representation'" at 25% of the past-due benefits, *id.* at 1193 (quoting 42 U.S.C. 406(b)). But *Dawson* did not set forth any analysis of the block-quoted text that might have arguably supported its holding. See *id.* at 1193-1195. *Dawson* merely noted that the attorney seeking fees had not "discussed the statutory language" in arguing for his contrary position. *Id.* at 1195.

Rather than analyzing the statutory text, *Dawson* relied heavily on congressional testimony preceding Section 406(b)'s enactment in 1965, in which an official of the Department of Health, Education, and Welfare (which was then responsible for administering the Social Security Act) noted an "occasion[al]" problem of "what appeared to be inordinately large fees for representing claimants *in Federal district court actions* arising under the social security program." 425 F.2d at 1194 (emphasis added; citation omitted). But that testimony does not reflect that Section 406(b) imposes a cap on the *aggregate* amount of fees for both administrative and court proceedings. The text of Section 406(b), like that testimony, targets only attorney's fees for representation in court proceedings.[8]

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[8] The government opposed certiorari in *Dawson* by filing a three-page memorandum in opposition, which included a single, four-sentence paragraph asserting that the court of appeals had correctly interpreted Section 406(b). Gov't Mem. in Opp. at 2-3, *Dawson*, *supra* (No. 70-427) (Aug. 17, 1970). The government's memorandum neither reproduced the relevant portion of Section 406(b)'s text limiting its attorney's fee provisions to fees for "represent[ation] before the court," 42 U.S.C. 406(b)(1)(A), nor discussed or analyzed that limitation. Gov't Mem. in Opp. at 2-3, *Dawson*,

The Fourth Circuit's per curiam decision in *Morris* likewise offered no sound basis for concluding that Section 406 "limits the aggregate attorney's fees recoverable to twenty-five percent of the claimant's past-due benefits." 689 F.2d at 496. *Morris* rested its decision on an inference it derived from Section 406(a) and (b). First, *Morris* determined that Section 406(b) imposes a 25% cap on the amount of attorney's fees that "courts [may] authorize[]." *Id.* at 497. Second, *Morris* determined that Section 406(a) also prohibits SSA from "approv[ing] an attorney's fee in excess of twenty-five percent," apparently (and erroneously) based on statutory text—now amended and relocated to Section 406(a)(4)—stating that the agency "'shall . . . certify for payment (out of [the claimant's] past-due benefits)'" up to "'25 per centum of the total amount of such past-due benefits.'" *Id.* at 497 & n.1 (quoting 42 U.S.C. 406(a) (1976)); see *id.* at 496. *Morris* then concluded that "the most reasonable inference to be drawn" from the purported 25% caps in both Section 406(a) and (b) was that Congress intended an aggregate 25% cap "to establish a ceiling for attorney's fees that was independent of the course of the proceedings." *Id.* at 497-498.

That inference-based analysis does not purport to ground an aggregate 25% fee cap in any statutory text directly establishing such a limit and, for the reasons previ-

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supra. The memorandum instead relied only on the portion of Section 406(b)'s text imposing a 25% cap and, like the *Dawson* court, invoked an inapposite passage from legislative history. *Ibid.* The government has now fully analyzed the text and concludes that its abbreviated 1970 analysis of Section 406(b) was both incomplete and incorrect. See Gov't Cert-Stage Br. 22 (discussing the government's change in position).

ously discussed, that atextual reading is incorrect. Moreover, *Morris* is flawed even on its own terms. *Morris* erroneously conflated SSA's determination of a reasonable fee for agency proceedings under Section 406(a) with the agency's separate certification under Section 406(a) of a direct "payment" to the attorney of (some or all of) the approved fee out of past-due benefits, deeming the latter to impose a cap on the former. See *Clark* v. *Astrue*, 529 F.3d 1211, 1217-1218 (9th Cir. 2008) (noting this error). The Fourth Circuit's inferential logic is accordingly flawed because it rests on a mistaken understanding of Section 406(a). See *ibid.*

B. Section 406 Provides Alternative Means To Regulate The Total Amount Of Attorney's Fees In OASDI Cases

The absence of a statutory cap on the aggregate amount of attorney's fees for agency proceedings (under Section 406(a)) and court proceedings (under Section 406(b)) does not mean that the agency and courts should approve fees that in aggregate total 50% or more of the client's past-due benefits. Although it is mathematically possible to produce an aggregate fee of such magnitude without a 25% aggregate cap, Section 406(a) and (b) confer upon SSA and a reviewing court sufficient discretion to prevent unduly large fees. Their approval of Title II fee awards of such magnitude should therefore be "unlikely" if the agency and the courts properly discharge their responsibility to "ensur[e] the attorney fee is reasonable." *Wrenn ex rel. Wrenn* v. *Astrue*, 525 F.3d 931, 938 (10th Cir. 2008).

Section 406(a)(1) directs SSA to approve only a "reasonable fee" for work in agency proceedings through SSA's fee-petition process. 42 U.S.C. 406(a)(1). Thus, although the fee that the agency can approve will not provide compensation for "any service the representative

gave [the claimant] in any proceeding before a * * * court," 20 C.F.R. 404.1728(a), SSA nevertheless requires that the representative's fee petition disclose the amount of any additional fee the representative "wants to request or charge for his or her services in the same matter before any * * * court." 20 C.F.R. 404.1725(a)(4). The agency then evaluates the appropriate fee by considering several factors, 20 C.F.R. 404.1725(b)(1), including "[t]he amount of fee the representative requests for his or her services, including any amount authorized or requested before," 20 C.F.R. 404.1725(b)(1)(vii). The agency ultimately approves a reasonable fee by considering those factors in the context of the Social Security program's "purpose" of "provid[ing] a measure of economic security for the beneficiaries." 20 C.F.R. 404.1725(b)(1). That administrative process for evaluating the reasonableness of a fee properly accounts for the aggregate amount of fees that may be charged to the claimant for work before the agency and in court.

The agency's authority in the fee-agreement context under Section 406(a)(2) and (3) is also sufficient to prevent excessive fees in Title II cases. When other statutory criteria are satisfied, Section 406(a)(2) provides that the agency "shall approve" a fee agreement "at the time of the [agency's] favorable [benefits] determination"—thereby making "the fee specified in the agreement the maximum fee"—if the "the fee specified in the agreement" does not exceed the lesser of "25 percent of the total amount of [the claimant's] past-due benefits" or $6000. 42 U.S.C. 406(a)(2)(A)(ii); see pp. 4-5 & n.2, *supra*. But the claimant—and in certain contexts, the ALJ or other agency adjudicator who made the favorable benefits determination—may then request that SSA "reduce the maximum fee" on administrative review. 42 U.S.C.

406(a)(3)(A)(i); see 42 U.S.C. 406(a)(3)(A) (authorizing agency adjudicator to request that the Commissioner reduce the maximum fee if, for instance, "the fee is clearly excessive for services rendered"). Consistent with Congress's determination that SSA must approve a "reasonable fee" for administrative proceedings in the absence of an appropriate fee agreement, 42 U.S.C. 406(a)(1), and Congress's unqualified grant of authority to an SSA adjudicator to "affirm or modify" a maximum fee authorized by a fee agreement on administrative review (a decision that is itself "not * * * subject to further review"), 42 U.S.C. 406(a)(3)(C), SSA determines on review "whether the fee authorized under the fee agreement process is reasonable" and, if it is not, will reduce the approved fee in order to "set a reasonable fee" for agency proceedings. POMS, GN 03960.050B and C.1-C.3 (Jan. 15, 2010), http://policy.ssa.gov/poms.nsf/lnx/0203960050; see SSA, Office of Hearings and Appeals, *Litigation Law Manual* (HALLEX) I-1-2-47.A.4 and C (Jan. 28, 2003), https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-47.html.

Section 406(b) similarly grants a reviewing court discretion in reviewing a fee application for an attorney's representation of the prevailing claimant before the court, by providing that "the court *may* determine and allow * * * a reasonable fee for such representation." 42 U.S.C. 406(b)(1)(A) (emphasis added); see *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion" in an attorney's fee provision.). Just as the agency may consider the total amount of fees awarded or sought in determining a "reasonable fee" under Section 406(a)(1), so too may a court consider the overall fee burden on the claimant when exercising its sound discretion

under Section 406(b) to determine the amount of a "reasonable fee" for court proceedings. Given the parallel text of both provisions, it would be "anomalous" to treat a court's authority to approve a reasonable fee any differently in this regard. Cf. *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 806 (2002) (concluding that it would be "anomalous" if contract-based fees that the agency may approve under Section 406(a)(2) were not also available under Section 406(b)'s fee provisions for court proceedings).

Even when an attorney seeks a reviewing court's approval of a "reasonable fee" under Section 406(b) based on a fee agreement with the claimant, "[Section] 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807. While "Congress has provided one boundary line" by prohibiting fees for court proceedings "exceeding 25 percent of the past-due benefits," the attorney seeking court approval of his requested fee still "must show that the fee sought is reasonable." *Ibid.* "If the benefits are large in comparison to the amount of time counsel spent on the case," for instance, "a downward adjustment is * * * in order." *Id.* at 808. Similarly, if the total amount of fees sought from the claimant is not reasonable in comparison to the benefits ultimately awarded, a downward adjustment would be in order to ensure that approved fees are, at the end of the day, "reasonable." "Judges of [the Nation's] district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters * * * ordinarily qualify for highly respectful review." *Ibid.* Thus, while Congress has not imposed a 25% cap on the aggregate amount of attorney's fees that may be approved under Section 406(a) and (b) for work before the agency and in court, Congress has

vested the agency and the courts with adequate authority to ensure that such fees are not excessive in particular cases.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2412 provides in pertinent part:

Costs and fees

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * * * *

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor,

such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) * * * *

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

* * * * *

2. Section 206(b) of the Equal Access to Justice Act, as added by the Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (28 U.S.C. 2412 note), provides:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

3. Section 206 of the Social Security Act, 42 U.S.C. 406, provides in pertinent part:

Representation of claimants before Commissioner

(a) Recognition of representatives; fees for representation before Commissioner

(1) * * * * The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if—

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of—

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant,

then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Commissioner of Social Security shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In any case involving—

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter, and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims,

the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of—

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,

(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D)—

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review

shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

(4) Subject to subsection (d) of this section, if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Commissioner of Social Security shall, notwithstanding section 405(i) of this title, certify for payment out of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title).

(5) Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both. The Commissioner of Social Security shall maintain in the electronic information retrieval system used by the Social Security Administration a

current record, with respect to any claimant before the Commissioner of Social Security, of the identity of any person representing such claimant in accordance with this subsection.

(b) Fees for representation before court

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(B) For purposes of this paragraph—

(i) the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title, and

(ii) amounts of past-due benefits shall be determined before any applicable reduction under section 1320a-6(a) of this title.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that

allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

(c) Notification of options for obtaining attorneys

* * * * *

(d) Assessment on attorneys

(1) In general

Whenever a fee for services is required to be certified for payment to an attorney from a claimant's past-due benefits pursuant to subsection (a)(4) or (b)(1) of this section, the Commissioner shall impose on the attorney an assessment calculated in accordance with paragraph (2).

(2) Amount

(A) The amount of an assessment under paragraph (1) shall be equal to the product obtained by multiplying the amount of the representative's fee that would be required to be so certified by subsection (a)(4) or (b)(1) of this section before the application of this subsection, by the percentage specified in subparagraph (B), except that the maximum amount of the assessment may not exceed the greater of $75 or the adjusted amount as provided pursuant to the following two sentences. In the case of any calendar year beginning after the amendments made by section 301 of the Social Security Protection Act of 2003[9] take effect, the dollar amount specified in the preceding sentence (including a previously adjusted

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[9] See References in Text note below.

amount) shall be adjusted annually under the procedures used to adjust benefit amounts under section 415(i)(2)(A)(ii) of this title, except such adjustment shall be based on the higher of $75 or the previously adjusted amount that would have been in effect for December of the preceding year, but for the rounding of such amount pursuant to the following sentence. Any amount so adjusted that is not a multiple of $1 shall be rounded to the next lowest multiple of $1, but in no case less than $75.

(B) The percentage specified in this subparagraph is—

(i) for calendar years before 2001, 6.3 percent, and

(ii) for calendar years after 2000, such percentage rate as the Commissioner determines is necessary in order to achieve full recovery of the costs of determining and certifying fees to attorneys from the past-due benefits of claimants, but not in excess of 6.3 percent.

(3) Collection

The Commissioner may collect the assessment imposed on an attorney under paragraph (1) by offset from the amount of the fee otherwise required by subsection (a)(4) or (b)(1) of this section to be certified for payment to the attorney from a claimant's past-due benefits.

(4) Prohibition on claimant reimbursement

An attorney subject to an assessment under paragraph (1) may not, directly or indirectly, request or otherwise obtain reimbursement for such assessment

from the claimant whose claim gave rise to the assessment.

(5) Disposition of assessments

Assessments on attorneys collected under this subsection shall be credited to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, as appropriate.

(6) Authorization of appropriations

The assessments authorized under this section shall be collected and available for obligation only to the extent and in the amount provided in advance in appropriations Acts. Amounts so appropriated are authorized to remain available until expended, for administrative expenses in carrying out this subchapter and related laws.

(e) Extension of fee withholding and assessment procedures to qualified non-attorney representatives

(1) The Commissioner shall provide for the extension of the fee withholding procedures and assessment procedures that apply under the preceding provisions of this section to agents and other persons, other than attorneys, who represent claimants under this subchapter before the Commissioner.

* * * * *

4. 20 C.F.R. 404.1703 provides in pertinent part:

Definitions.

As used in this subpart—

* * * * *

Eligible non-attorney means a non-attorney representative who we determine is qualified to receive direct payment of his or her fee under § 404.1717(a).

* * * * *

Past-due benefits means the total amount of benefits under title II of the Act that has accumulated to all beneficiaries because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made. For purposes of calculating fees for representation, we determine past-due benefits before any applicable reduction under section 1127 of the Act (for receipt of benefits for the same period under title XVI). Past-due benefits do not include:

(1) Continued benefits paid pursuant to § 404.1597a of this part; or

(2) Interim benefits paid pursuant to section 223(h) of the Act.

* * * * *

Representative means an attorney who meets all of the requirements of § 404.1705(a), or a person other than an attorney who meets all of the requirements of § 404.1705(b), and whom you appoint to represent you in dealings with us.

* * * * *

5. 20 C.F.R. 404.1725 provides:

Request for approval of a fee.

(a) *Filing a request.* In order for your representative to obtain approval of a fee for services he or she performed in dealings with us, he or she shall file a written request with one of our offices. This should be done after the proceedings in which he or she was a representative are completed. The request must contain—

(1) The dates the representative's services began and ended;

(2) A list of the services he or she gave and the amount of time he or she spent on each type of service;

(3) The amount of the fee he or she wants to charge for the services;

(4) The amount of fee the representative wants to request or charge for his or her services in the same matter before any State or Federal court;

(5) The amount of and a list of any expenses the representative incurred for which he or she has been paid or expects to be paid;

(6) A description of the special qualifications which enabled the representative, if he or she is not an attorney, to give valuable help in connection with your claim; and

(7) A statement showing that the representative sent a copy of the request for approval of a fee to you.

(b) *Evaluating a request for approval of a fee.* (1) When we evaluate a representative's request for approval of a fee, we consider the purpose of the social security program, which is to provide a measure of

economic security for the beneficiaries of the program, together with—

(i) The extent and type of services the representative performed;

(ii) The complexity of the case;

(iii) The level of skill and competence required of the representative in giving the services;

(iv) The amount of time the representative spent on the case;

(v) The results the representative achieved;

(vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and

(vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

(2) Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit alone, but on a consideration of all the factors listed in this section. The benefits payable in any claim are determined by specific provisions of law and are unrelated to the efforts of the representative. We may authorize a fee even if no benefits are payable.

6. 20 C.F.R. 404.1728 provides:

Proceedings before a State or Federal court.

(a) *Representation of a party in court proceedings.* We shall not consider any service the representative gave you in any proceeding before a State or Federal court to be services as a representative in dealings with us. However, if the representative also has given service to you in the same connection in any dealings with us, he or she must specify what, if any, portion of the fee he or she wants to charge is for services performed in dealings with us. If the representative charges any fee for those services, he or she must file the request and furnish all of the information required by § 404.1725.

(b) *Attorney fee allowed by a Federal court.* If a Federal court in any proceeding under title II of the Act makes a judgment in favor of a claimant who was represented before the court by an attorney, and the court, under section 206(b) of the Act, allows to the attorney as part of its judgment a fee not in excess of 25 percent of the total of past-due benefits to which the claimant is entitled by reason of the judgment, we may pay the attorney the amount of the fee out of, but not in addition to, the amount of the past-due benefits payable. We will not certify for direct payment any other fee your representative may request.

7. 20 C.F.R. 404.1730 provides in pertinent part:

Payment of fees.

(a) *Fees allowed by a Federal court.* We will pay an attorney representative out of your past-due benefits the amount of the fee allowed by a Federal court in a

proceeding under title II of the Act. The payment we make to the attorney is subject to the limitations described in paragraph (b)(1) of this section.

(b) *Fees we may authorize*—(1) *Attorneys and eligible non-attorneys.* Except as provided in paragraph (c) of this section, if we make a determination or decision in your favor and you were represented by an attorney or an eligible non-attorney, and as a result of the determination or decision you have past-due benefits, we will pay the representative out of the past-due benefits, the smaller of the amounts in paragraph (b)(1)(i) or (ii) of this section, less the amount of the assessment described in paragraph (d) of this section.

(i) Twenty-five percent of the total of the past-due benefits; or

(ii) The amount of the fee that we set.

(2) *Non-attorneys ineligible for direct payment.* If the representative is a non-attorney who is ineligible to receive direct payment of his or her fee, we assume no responsibility for the payment of any fee that we authorized. We will not deduct the fee from your past-due benefits.

(c) *Time limit for filing request for approval of fee to obtain direct payment.* (1) To receive direct fee payment from your past-due benefits, a representative who is an attorney or an eligible non-attorney should file a request for approval of a fee, or written notice of the intent to file a request, at one of our offices, or electronically at the times and in the manner that we prescribe if we give notice that such a method is available, within 60 days of the date we mail the notice of the favorable determination or decision.

(2)(i) If no request is filed within 60 days of the date the notice of the favorable determination is mailed, we will mail a written notice to you and your representative at your last known addresses. The notice will inform you and the representative that unless the representative files, within 20 days from the date of the notice, a written request for approval of a fee under § 404.1725, or a written request for an extension of time, we will pay all the past-due benefits to you.

(ii) The representative must send you a copy of any request made to us for an extension of time. If the request is not filed within 20 days of the date of the notice, or by the last day of any extension we approved, we will pay all past-due benefits to you. We must approve any fee the representative charges after that time, but the collection of any approved fee is a matter between you and the representative.

(d) *Assessment when we pay a fee directly to a representative.* (1) Whenever we pay a fee directly to a representative from past-due benefits, we impose an assessment on the representative.

* * * * *

No. 17-773

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

I. The Court-Appointed Amicus Fails To Address The Text

Amicus[1] knows where she must start—with the text. Amicus Br. 13. Hers, however, is an exceedingly odd "textual" argument. She invokes a broad array of textual principles, like reading the statute in its "entirety," *ibid.*, attending to the language's "context," *ibid.*, and "look[ing] * * * to [the statute's] object and policy," *ibid.*, and enlists various adages of interpretation counseling that "when a Social Security Act provision can be *reasonably interpreted* in favor of one seeking benefits," which this one cannot, "it should be so construed," *id.* at 14 (emphasis added and citation omitted). But she never addresses the only two words that matter: "such representation." 42 U.S.C. § 406(b). Indeed, she mentions these two words only once in her whole brief—in passing, in a footnote, which simply quotes without analysis the much larger provision in which the two key words originally appeared. See Amicus Br. 15 n.9 (quoting original amendment). Whatever else it may be, her primary argument is not textual. It is—at best—a misguided policy argument in textualist drag.

As all those courts below that have addressed the text agree, the statute's meaning turns on the two

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[1] Two amici have filed briefs in the case. To ease exposition, this reply refers to the Court-appointed amicus as amicus and cites her brief as Amicus Br. It refers to the other amicus, the National Organization of Social Security Claimants' Representatives, as NOSSCR and cites its brief as NOSSCR Amicus Br.

words "such representation." "Such" is a term "used to avoid repetition" and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1976). The only representation § 406(b) refers to is representation "before the court." 42 U.S.C. § 406(b). Thus, the 25-percent cap on attorney's fees awarded for "such representation" can apply only to fees for representation "before the court." Amicus does not argue that these words can be interpreted any other way. She simply ignores them lest discussion reveal their clarity.

Amicus's primary "textual" argument, making up all but the first two paragraphs of her textualist section, rides a very different beast: legislative history. Amicus Br. 14-19. She makes two moves. First, amicus tries to enlist the enactment history in aid of an argument that § 406(b)'s 25-percent cap applies to work done both before the agency and the courts. She notes, correctly, that before the 1965 amendments, which added § 406(b), the agency had long been authorized to issue rules prescribing maximum attorney's fees for work before the agency. *Id.* at 14. She sees there a "concern * * * that [attorneys sh]ould not overbill their clients," *id.* at 14-15, that she believes Congress "echoed 30 years later" in 1965 when it enacted § 406(b). That may be true, but it says nothing about *how much* Congress was worried and *how much* it sought to balance this concern against other competing ones it expressly mentioned, like making sure attorneys were properly incentivized to take on social security cases. In short, this "concern"

by itself sheds no light on whether § 406(b)'s cap applies to work before both the agency and courts.

Second, amicus argues that in amending § 406(*a*) in 1990 Congress implicitly codified her atextual understanding of § 406(*b*). She claims that "at the time [§ 406(a)] was enacted * * * federal circuit courts of appeals were in unanimous agreement that there was an aggregate 25% cap on attorney's fees * * * [and] Congress presumptively was aware of this." Amicus Br. 18. Four problems immediately appear. For starters, the assent of the Fourth, Fifth, Sixth, and Eleventh Circuits hardly constitutes unanimity, especially when the Sixth Circuit at the government's urging was soon to reverse itself. See *Horenstein* v. *Sec'y of Health & Human Servs.*, 35 F.3d 261, 262 (1994) (en banc). For another, the 1990 conference report itself expressly contemplates that overall attorney's fees could exceed 25 percent of the award. It notes that "if the attorney were *awarded a fee in excess of 25 percent* of the claimant's past-due social security benefits, the amount payable to the attorney out of the past-due social security benefits could not exceed 25 percent of these benefits." H.R. Rep. No. 101-964, at 934 (1990) (Conf. Rep.) (emphasis added).

Her codification argument, moreover, fails on its own terms. The doctrine cannot compel an interpretation that is contrary to the plain language of the statute, see *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) (noting that "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous * * * construction"), and an

aggregate fee cap would contravene § 406(b)'s key words: "such representation."

Even if the text were ambiguous, moreover, which it is not, amicus misunderstands the language she quotes to support congressional adoption: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it *re-enacts* a statute without change." Amicus Br. 18 (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (emphasis added)). That may be true, but Congress did not re-enact *any* portion of § 406 in 1990. Rather, Congress *added* § 406(a)(2), providing for the fee agreement process, see Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5106(a), 104 Stat. 1388, 1388-266, and left § 406(b) *unchanged*. As this Court has held, when "Congress * * * has made only isolated amendments[, i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (citation and internal quotation marks omitted).

II. The Legislative History Underscores What The Text Says: § 406(b)'s Cap Applies Only To Fees Awarded For Work "In Court"

Amicus's second argument betrays her first. She argues next that "one must resort to the legislative history of the statute" because "Congress's silence on the issue presented * * * creates an ambiguity." Amicus Br. 19. But if Congress was silent, how can "[t]he [*t*]*ext*," as she earlier argued, "[s]upport[] a 25%-[a]ggregate [r]ule"? *Id.* at 13 (emphasis added and

bolding omitted). As she herself admits, "[s]ilence * * * normally creates ambiguity. It does not resolve it." *Id.* at 19 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). She cannot have it both ways.

Although Congress was not silent when it applied the 25%-cap only to "such representation," the legislative history can still aid interpretation. Properly understood, it "corroborate[s] and fortifies the proper] understanding of the text." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring).

Amicus treats the two key words in the legislative history, "in court," even more peculiarly than she treats the two key words of the statute. She does not skip over them as if they never appear. See p. 1, *supra*. She instead quotes them repeatedly without realizing that they undercut her argument. See, *e.g.*, Amicus Br. 19-20 (noting HEW concern that "attorneys occasionally charged inordinately large contingency fees for representing claimants *in court*") (emphasis added); *id.* at 20 (noting committee's concern "that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants *in* Federal District *court* actions") (citing S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess. (1965)) (emphasis added). These words, apparently hiding in plain sight, make clear that Congress intended § 406(b)'s cap to apply only to fees for work "in court," not before the agency.[2]

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[2] Amicus also acknowledges that the 1965 amendment had a second purpose: ensuring effective representation for claimants.

Amicus next argues that "[i]t is difficult, if not impossible, to reconcile" petitioner and respondent's view of the cap with the 1968 amendment, which placed a similar 25-percent cap on fees for work before the agency. Amicus Br. 21. But there is no difficulty, let alone impossibility, here. Since the enactment of § 406(b) in 1965 placed no limit on *total* fees, but only on fees for work "in court," the 1968 amendment was meant to finish the work by applying a cap similar to, but distinct from, § 406(b)'s to all the fees not yet covered: those for work before the agency.

III. Amicus's Policy Arguments In Favor Of An Aggregate Cap Misunderstand The Statute And Practice

1. Amicus claims that petitioner's view would create a "race to the agency" between attorneys looking to collect their fees. Amicus Br. 23-24. But her view misunderstands the consequences of her own position. An aggregate cap would create far greater pressure for attorneys to race.

Section 406 creates two possible races between agency and court attorneys—an authorization race and a payment race. In an authorization race, the court and agency attorneys both race to their respective fora seeking to have each tribunal authorize the fee award before the other. In a payment race,

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Amicus Br. 19. Since the statute necessarily compromises between competing policy goals, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987). See pp. 2-3, *supra* (noting same).

both attorneys rush after authorization to claim (and thus be directly paid) from the 25 percent of past-due benefits withheld by the agency.

Amicus focuses only on the payment race. She notes that without an aggregate cap the total fees authorized could exceed the 25 percent of past-due benefits withheld by the agency. Amicus Br. 23-24 Faced with the undesirable prospect of collecting any fees not paid directly by the agency from their clients, both attorneys would run to be the first to request direct payment from the agency. *Ibid.*

Maybe so. But to the lawyers involved, the consequences of losing the payment race under an aggregate cap are nowhere near as dire as losing the authorization race. Under amicus's aggregate authorization cap, if the attorney who won the authorization race secured a 25-percent fee, the other attorney could not request *authorization*, let alone payment, of any additional fees. And, unlike the loser of amicus's hypothetical payment race, who could at least attempt to collect any unpaid fees from the client, "[c]ollecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (citing 42 U.S.C. §§ 406(a)(5), (b)(2) (1994 ed.); 20 C.F.R. §§ 404.1740-1799). Thus, the loser of the authorization race would be left with little or nothing at all, which makes representing claimants very risky.

Amicus argues that "there are safeguards to prevent" one attorney from "us[ing] up" the full 25 percent of past-due benefits to the detriment of the

other. Amicus Br. 41. But her purported safeguards are illusory.

First, she claims that "in circuits operating under the 25%-aggregate rule * * * it is standard practice for an attorney who accepts representation of a claimant in court to enter an agreement ahead of time delineating how any withheld benefits will be split between counsel." Amicus Br. 41. But tellingly she cites no evidence—possibly because none exists. On the contrary, most social security attorneys enter into standard agreements calling for fees equal to 25 percent of past-due benefits. See Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability Law & Procedure in Federal Court* § 10:13 (2018) (noting that "attorneys routinely enter into contingent-fee agreements for the statutory maximum, specifying that the fee will be 25% of any past-due benefits recovered"); see also *id.* § 10:14 (model fee agreement providing for 25 percent of past-due benefits in fees).

Second, she argues that since both the agency and court require an attorney requesting fees to tell them how much she is requesting from the other forum "there would be no opportunity for [an] attorney to use up the pot of [withheld] past-due benefits." Amicus Br. 42. But of course, even if the agency and courts could adjust the fees they authorize by considering what the attorney requested from the other tribunal,[3] when the

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[3] Amicus NOSSCR objects to what it understands to be part of the Commissioner's argument: "that a court may impose * * * a cumulative cap as a matter of discretion." NOSSCR Amicus Br. 10. Petitioner is less certain that this represents the

first forum authorizes its award the other's actual award is unknown. If different attorneys represented the claimant before the agency and court, which is common, amicus's safeguard vanishes completely. Each attorney would tell the authorizing forum that she was not requesting any fees from the other forum. Thus, both the agency and the court would have no information about what the other might authorize.

2. Attempting to muddy the otherwise clear statutory text, amicus raises another fictive concern: "multiple 'stackable' attorney's fee awards." Amicus Br. 24. She imagines a claimant who wins in both federal district court and the court of appeals. *Id.* at 25-26. She then claims that, under petitioner's view, each court could separately authorize up to 25 percent of past-due benefits in attorney's fees. *Ibid.* Those awards could then be further "stacked" with the 25 percent of past-due benefits the agency can authorize to produce an "absurd" result in which up to 75 percent of past-due

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Commissioner's position, but in any event the issue was neither raised nor addressed below and should not detain the Court here. The proposition—at least in its broadest form—is dubious. Simply reducing a court fee award one dollar for every dollar awarded in fees by the agency would represent an abuse of the court's discretion. *Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924) (holding "sound judicial discretion [must be] guided and controlled by a consideration of whatever has a *rational* bearing on the propriety of the [decision]") (emphasis added). A simple dollar-for-dollar setoff after the aggregate cap was reached would ignore factors, like degree of success, benefit to the claimant, hours worked, the lawyer's ordinary hourly rate, and the difficulty of the case, on which a court should rest its fees decision. See *Gisbrecht*, 535 U.S. at 808 (listing factors).

benefits are consumed by fees. *Id.* at 24-26. But this is pure fantasy.

Amicus cannot identify a single instance in which a federal court has awarded such stackable fees for work in the district court and court of appeals. Not one has. And none of the major treatises on social security law even mentions this possibility. The cases amicus cites are not to the contrary. As amicus's own parentheticals indicate, each stands for the unremarkable proposition that a district court may award attorney's fees under § 406(b) for services performed in both the court of appeals and district court. See *Lavender* v. *Califano*, 683 F.2d 133, 134-135 (6th Cir. 1982); *Brown* v. *Gardner*, 387 F.2d 345, 346 (4th Cir. 1967); *Bailey* v. *Heckler*, 621 F. Supp. 521, 523 (W.D. Pa. 1985).[4] That is entirely consistent with petitioner's view that the *combined* amount of such fees for in-court representation cannot exceed § 406(b)'s 25-percent cap.

Amicus also ignores a provision in the statute that forecloses stackable court fees. When a court renders judgment in favor of a claimant, it may authorize "a reasonable [attorney's] fee * * * not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled *by reason of such judgment*." 42 U.S.C. § 406(b)(1)(A) (emphasis added). In her hypothetical of repeatedly successful judicial appeals,

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[4] Indeed, the *Lavender* court implicitly rejected amicus's view, speaking of a single fee determination and a single 25-percent cap on the fees the attorney could request for all court work. See *Lavender*, 683 F.2d at 135 (holding that "the district court judge is empowered to make *the* fee determination") (emphasis added).

the claimant would be "entitled" to past-due benefits only "by reason" of the last judgment. She could not enforce any demand for payment from the agency before it.

3. Amicus next claims that "[l]ogic supports the 25%-aggregate rule" since "it makes sense to divvy up" the agency and court fees so that attorneys' time spent before the agency and court is appropriately compensated, and "[t]he 25%-aggregate rule does just that." Amicus Br. 26-27 (bolding omitted from first quotation). In fact, it does not.

The aggregate rule cannot divvy up the 25 percent of withheld past-due benefits "appropriately" because § 406 makes no provision for it. How could a court and the agency "appropriately" split up the fees between two attorneys who represented a single claimant at each stage? The court and agency would have to confer, comparing the amount and value of work each attorney did in each forum and authorize fees accordingly. But the statute never contemplates such deep and creative collaboration. See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002) (noting the statute "deals" with the agency and the court "discretely"); 20 C.F.R. §§ 404.1725, 1728, 1730. Nor does it allow an attorney in one forum to petition the other forum to lower fees authorized there. The agency, in fact, just pays court- and agency-authorized fees in the order it receives the requests. See Soc. Sec. Admin., *Program Operations Manual System* GN 03920.050D.4 (Sept. 30, 2011) (*POMS*), https://tinyurl.com/yak75mr8 ("Pay administrative fees and the court fees in the order the component or office responsible for issuing the

payment receives the fee authorizations."). That is what leads attorneys to race both for authorization and payment. Congress would have to overhaul the statute for the agency to "divvy up" the withheld amount in the way amicus suggests.

4. Amicus argues that since "[r]espondent for decades agreed with [the] aggregate rule," that rule is correct. Amicus Br. 27. But both her historical assumption and her conclusion are wrong. The Commissioner first argued that an aggregate cap violates § 406(b) on February 10, 1993. In a brief submitted by Hon. Stuart Gerson, at the time both the Assistant Attorney General for the Civil Division and Acting Attorney General, the Commissioner argued, among other things, that §§ 406(a) and 406(b) "set different statutory maximum allowable fees," Gov't Br. and Suggestion of Initial Hr'g En Banc at 18, *Horenstein* v. *Sec'y of Health & Human Servs.*, 35 F.3d 261 (6th Cir. 1994) (en banc) (Nos. 90-4028 & 92-4302), which led the Sixth Circuit to overturn its previous aggregate cap, *Horenstein*, 35 F.3d at 262. But even if, counterfactually, the agency had hewn to the aggregate cap until recently, that would not validate it. "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Pub. Emps. Ret. Sys. of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989).

5. Amicus also argues that it is unethical for an attorney, like petitioner, to "[o]ppos[e] a 25% aggregate rule" because doing so "creates an irreconcilable conflict between an attorney's personal financial interest and his ethical obligation of zealous advocacy

on behalf of the client." Amicus Br. 30. But this argument proves too much. Taken to its logical conclusion, it would bar an attorney from seeking payment for his fees whenever a client objected—no matter what and how flimsy the ground. In this case, petitioner is seeking only to receive what a proper interpretation of the law allows him. That is hardly unethical.

IV. The Practical Arguments Against An Aggregate Rule Are Compelling

Amicus closes with a hodge-podge of arguments in favor of an aggregate cap. Amicus Br. 31-43. None persuades.

1. In an attempt to wave away concerns about disincentivizing attorneys from representing social security claimants, amicus turns to the "data." Amicus Br. 31. In her reading, it indicates that "the filings of Social Security cases in the district courts within the three circuits that have adopted the 25%-aggregate rule has [*sic*] steadily *increased*." *Id.* at 31-32. This does not pass the sniff test. By themselves, increasing filing rates in aggregate jurisdictions mean little. Rather, how much they have increased and how they compare to filing rates in non-aggregate jurisdictions are the more relevant concerns. More importantly, the "stead[y] increase[]" amicus sees is a statistical artifact of her particular frame of reference. If one looks at filing rates for twelve-month periods ending on June 30 rather than for those ending on December 31, as she does, one sees consistent vacillation. Compare Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2018),

https://tinyurl.com/y73t43ja (reporting end date June 30, 2018), with Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2017), https://tinyurl.com/ybjc5omu (reporting end date June 30, 2017), with Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2016), https://tinyurl.com/yamavkpl (reporting end date June 30, 2016).

2. Amicus then points to four cases in which attorneys "obtain[ed] court fees computed at an hourly rate of over $1,000." Amicus Br. 32. In each of these four cases, however, the district court carefully reviewed the requested fees and found them reasonable. See *Sabourin* v. *Colvin*, No. 3:11-cv-2109, 2014 WL 3949506, at *2 (N.D. Tex. Aug. 12, 2014) ("Considering all [the] factors, the Court finds that the fee award requested * * * would not result in an unearned windfall to [the attorney], but rather constitutes fair compensation."); *Melvin* v. *Colvin*, No. 5:10-CV-160, 2013 WL 3340490, at *3 (E.D.N.C. July 2, 2013) ("[T]he court does not find that the effective reimbursement rate * * * constitutes a windfall [and] the court finds the requested award * * * to be reasonable."); *Vilkas* v. *Comm'r of Soc. Sec.*, No. 2:03CV687FTM-29DNF, 2007 WL 1498115, at *2 (M.D. Fla. May 14, 2007) ("[T]he Court finds that the attorney's fees requested * * * do not violate the statutory cap, are not a product of fraud or overreaching, and are reasonable."); *Claypool* v. *Barnhart*, 294 F. Supp. 2d 829, 834 (S.D.W. Va. 2003) ("[T]he Court finds Plaintiff's requested attorney fee

* * * reasonable in light of all the circumstances in this case.").

3. She next points to one claimant representative, perhaps not even an attorney, who received $38.6 million in fees in one year. Amicus Br. 33. "This level of income" certainly would "provide an adequate financial incentive," *ibid.*, for attorneys to represent claimants, but the report that amicus cites could not be clearer that this number is an abberation. As she herself notes, the vast majority of this income was directly "attributed to [the representative's] firm," *ibid.*, and other parts of it may have been passed through to others as well. Also, the busiest claimant representative that year handled 16,524 claimants. Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* 9 (2015) (*Informational Report*), https://tinyurl.com/y97wvypq. If one assumes, for purposes of illustration, that the highest paid representative was the one handling the most claimants (and some correlation would be expected), that representative's average awarded fee per claimant would amount to less than $2,500, which is hardly unreasonable.

Even if we focus on outliers, the lack of an aggregate cap cannot explain why a few representatives receive much in fees. Of the ten highest-earning claimant representatives that year, two came from non-aggregate cap jurisdictions (Utah and California) and two came from aggregate-cap jurisdictions (Florida and Texas). *Informational Report* App. C-2. Whatever explains these claimant

representatives' reported high earnings, it cannot be the cap—one way or the other.

As this Court has held, "the generality rather than the exception must form the basis for [a] rule." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988). "The median annual direct payment per claimant representative was approximately $20,300" that year and nearly 80 percent of "claimant representatives were paid less than $100,000." *Informational Report* App. C-1. These "generalit[ies]" of compensation raise no concern justifying an aggregate authorization cap.

4. Amicus next argues that the availability of EAJA fees creates an adequate incentive for attorneys. See Amicus Br. 33-34. While not rare, EAJA fees are only awarded in a minority of cases, see *Astrue* v. *Ratliff*, 560 U.S. 586, 601 n.2 (2010) (Sotomayor, J., concurring), and they can increase the attorney's bottom line only when they exceed awarded § 406(b) fees, see Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. § 2412 note) (requiring attorney to "refund[] to the claimant the amount of the smaller fee"). Section 406(b) fees, contingent in nature, are calculated to reflect the risk of no compensation—and thus exceed market rate. *E.g.*, *Crawford* v. *Astrue*, 586 F.3d 1142, 1149 (9th Cir. 2009) (en banc); *Wells* v. *Sullivan*, 907 F.2d 367, 370-71 (2d Cir. 1990). The EAJA lodestar rate, by contrast, does not. 28 U.S.C. § 2412(d)(2)(A); *Pierce*, 487 U.S. at 573-574. An EAJA fee will thus exceed a § 406(b) fee only when the attorney's § 406(b) award effectively reflects an hourly rate *well* below the market rate. That is reason to

question the adequacy of § 406(b) awards, not to blindly trust that "[t]he likelihood of obtaining EAJA fees for successful representation, payable over and above § 406 fees and regardless of whether past-due benefits are awarded, provides an attractive inducement to Social Security attorneys." Amicus Br. 34.

EAJA fees are, of course, an important aspect of the statutory scheme. *Ratliff*, 560 U.S. at 600 (Sotomayor, J., concurring). But they rarely change what the attorney takes home at night, and even then not by much. They are also an inadequate safeguard for a more fundamental reason. As this Court has noted, "it is quite impossible to base" an "economically viable contingent-fee practice" on the prospect of EAJA awards because "the lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable as to produce an EAJA award." See *Pierce*, 487 U.S. at 573-574.

5. Amicus recognizes the need to avoid a great anomaly that her reading of the statute creates: an aggregate authorization cap under § 406(b) would effectively render unreasonable fees awarded under § 406(a)(1)'s petition process whenever they exceed 25 percent of past-due benefits, as they can, *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008). To avoid that, she asserts "that the Commissioner has, by regulation, set the maximum fee under § 406(a)(1) when past-due benefits are awarded to the claimant as 25% of those past-due benefits." Amicus Br. 37.

Unfortunately for amicus, the Commissioner does not impose any such cap.

Once again, see pp. 6-7, *supra*, amicus confuses Social Security Administration (SSA) *authorization* and *payment* of fees. Amicus correctly notes that the SSA "may by rule and regulation, prescribe maximum fees" that may be charged for services before the agency. Amicus Br. 35 (quoting 42 U.S.C. § 406(a)(1)). But it has not here. Since § 406(a)(1) requires that charged fees be "reasonable," SSA does not impose any flat percentage cap on the fees it authorizes under the petition process. Rather,

> [w]hen [it] evaluate[s] a representative's request for approval of a fee, [it] consider[s] the purpose of the social security program, which is to provide a measure of economic security for the beneficiaries of the program, together with—
>
> (i) The extent and type of services the representative performed;
>
> (ii) The complexity of the case;
>
> (iii) The level of skill and competence required of the representative in giving the services;
>
> (iv) The amount of time the representative spent on the case;
>
> (v) The results the representative achieved;
>
> (vi) The level of review to which the claim was taken and the level of the review at which the representative became [the beneficiary's] representative; and

> (vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

20 C.F.R. § 404.1725(b)(1). And it allows attorneys to charge only those fees that it "*authorize*[*s.*]" *Id.* §§ 404.1720(b)(2)-(3) (emphasis added).

SSA does, by contrast, limit the amount it may directly "*pay*" attorneys under the petition process to "the smaller of [25] percent of the total of the past-due benefits[] or [t]he amount of the fee that [it] set[s,]" in other words, the amount it *authorizes*. 20 C.F.R. § 404.1730(b)(1) (emphasis added). This limitation, which amicus rests her argument on, see Amicus Br. 37 (discussing 20 C.F.R. § 404.1730(b)), follows directly from the statute, which limits the amount of attorney's fees the SSA shall "certify for *payment out of* * * * *past-due benefits*" to "so much of the maximum fee as does not exceed 25 percent" of the same. 42 U.S.C. § 406(a)(4) (emphasis added). Thus, although the agency has capped *payments* out of withheld benefits at 25 percent, it has not similarly capped the fees it may *authorize* under the petition process. On this point, amicus is simply mistaken.

6. Amicus also argues that an aggregate authorization cap prevents attorneys from "hound[ing]" social security beneficiaries "in perpetuity" for authorized fees that exceed 25 percent of withheld past-due benefits. Amicus Br. 41. She predicts, in particular, that without an aggregate cap lawyers will sue their clients for payment out of

"future disability or SSI benefits, or any other potential sources of income, including inheritances." *Ibid.* But social security's anti-assignment provision expressly protects future benefit payments from "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a); see also 20 C.F.R. § 404.1820(a)(2) (similar). And there is no unfairness in an attorney seeking payment for agreed-upon and authorized fees exceeding the 25 percent of past-due benefits originally withheld if the claimant experiences a windfall, like a large inheritance.[5]

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[5] In a footnote, amicus also suggests that attorneys could seek to recover awarded fees that exceed available withheld past-due benefits through "the SSA's administrative overpayment mechanism, whereby fees would be taken from [the claimant's future] monthly disability payments." Amicus Br. 24 n.18. But this is pure fantasy. What the case amicus cites actually suggests, in dicta, is that if an attorney tries to claim fees *after* the agency has already released the withheld amount to the claimant (because no timely authorization for payment was filed), the agency *might* be able to recover the prior withheld amount through garnishment and then release it to the attorney. See *Hayes* v. *Comm'r of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018) (describing possible payment mechanisms once the withheld amount has been released to claimant). This dicta does not apply, however, when the agency holds the reserved amount but awarded fees exceed it. In fact, the agency expresly prohibits this practice. See *POMS*, GN 03920.060B.4.b (Oct. 24, 2017), https://tinyurl.com/yd53d2la ("[The SSA] will not use overpayments incurred for months in or after the month a favorable court judgment is issued to offset the amount of past-due benefits it withholds for payment of the attorney's fee."). Even when the agency itself mistakenly fails to withhold a portion of past-due benefits to pay authorized attorney's fees, the agency does not

7. Amicus concedes, as she must, that the agency's own *Program Operations System Manuel* (*POMS*), "the publicly available operating instructions for processing Social Security claims," *Wash. St. Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003), acknowledges that aggregate fees under §§ 406(a) and (b) "may exceed 25 percent of past-due benefits," *POMS*, GN 03920.050C (Aug. 24, 2017), https://tinyurl.com/yak75mr8. She tries, however, to undercut the authority of the agency's position by arguing that "the POMS is merely a guidance manual directed at Social Security claim processors intended to instruct them on how to perform their jobs." Amicus Br. 39. While no one contends *POMS* has the full force of law, it does represent more than a shop-floor instruction manual. As this Court has recognized, "[w]hile [*POMS*] interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift." *Keffeler*, 537 U.S. at 385. Here the agency's considered and long-held view confirms the text's plain meaning.

* * *

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automatically garnish future benefits. See *id.* GN 03920.060B.5 ("If the court orders payment of an attorney's fee from past-due benefits and the processing center or field office did not withhold benefits, the reconsideration reviewer, senior claims processing specialist, disability specialist, or claims representative will contact the Office of the General Counsel for further instructtions.").

Just as "our inquiry beg[a]n[] with the statutory text, [it] ends there as well." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)). Sections 406(a) and 406(b) "deal[] with" SSA and court proceedings, respectively, and they do so "discretely." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002). Section 406(b) regulates fees for "attorney[s]" who "represented" a claimant "before the *court*" and places a cap on compensation available only for "*such* representation." 42 U.S.C. § 406(b)(1)(A) (emphasis added). "Rather than confront that statutory text, [amicus] asks [this Court] to ignore it altogether." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631. One can understand why she took that strategy. Addressing the text would have foreclosed her position.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 2018

No. 17-773

In the Supreme Court of the United States

RICHARD ALLEN CULBERTSON, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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REPLY BRIEF FOR THE RESPONDENT

The court of appeals held that 42 U.S.C. 406(b) caps at 25% of a Title II claimant's past-due benefits the aggregate amount of attorney's fees that an attorney may charge the claimant for representing her both in proceedings before the Social Security Administration (SSA) and in federal court. Pet. App. 11a-12a. That is incorrect. The government's opening brief explains that Section 406(b) imposes a 25% cap only on the fees that an attorney may charge for representing the claimant in court. Gov't Br. 15-22. Section 406(b)'s text plainly addresses only fees charged to the claimant "who was *represented before the court*" and imposes its 25% cap only on fees "for *such representation*." 42 U.S.C. 406(b)(1)(A) (emphasis added); see Gov't Br. 15-16. The statutory and regulatory framework governing fees under Section 406(a) for representing the claimant in SSA proceedings confirms that conclusion. Gov't

Br. 16-19. And although Congress did not impose an aggregate 25% cap, excessive aggregate fee awards should not result if SSA and the courts properly exercise their authority to approve "reasonable" fees in this context. *Id.* at 22-26.

The Court-appointed Amicus (Amicus) does not appear to contend that the text of Section 406(b) imposes a 25% aggregate cap. See Br. 11-19. The Amicus instead argues (Br. 13-19) that an aggregate 25% cap may be discerned if one reads Section 406(a) and Section 406(b) "together." But the Amicus does not identify anything in the text of Section 406(a) or Section 406(b), or the two read together, that purportedly imposes an aggregate 25% cap on the total amount of attorney's fees. See *ibid.* Nor does the Amicus's reliance on legislative history (Br. 19-22) and atextual policy considerations (Br. 23-31) advance the argument. Nothing warrants a departure from Section 406's text, which does not impose an aggregate 25% past-due-benefits cap on the total amount of attorney's fees for representing a claimant in agency proceedings and in court.

A. Nothing In The Text Of Section 406 Imposes A 25% Past-Due-Benefits Cap On The Aggregate Amount Of Attorney's Fees

1. Congress separately regulated the amount of fees that an attorney may collect from a Title II claimant in two subsections of 42 U.S.C. 406. "[Section] 406(a) governs fees for representation in administrative proceedings," and "[Section] 406(b) controls fees for representation in court." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002). Only three provisions in Section 406(a) and (b) set limitations based on 25% of past-due benefits. See 42 U.S.C. 406(a)(2)(A)(ii), (4), and (b)(1)(A). None of those three provisions—even if read "together" as

the Amicus suggests (Br. 13)—imposes an aggregate 25% cap on the total amount of fees that an attorney may charge the claimant for representing the claimant in agency proceedings and in court.

First, Section 406(b) governs attorney's fees that a court may approve for "represent[ing] [the claimant] before the court." 42 U.S.C. 406(b)(1)(A). And as noted (see p. 1, *supra*), Section 406(b) provides that the court may allow "a reasonable fee for *such representation*, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A) (emphasis added). The emphasized text makes clear that the 25% cap in Section 406(b) limits only the amount of fees for the attorney's work "before the court," *ibid.*, not the total amount of fees for work both before the agency and the court. Gov't Br. 15-16. The Amicus does not appear to argue otherwise. See Amicus Br. 13-19.

The second provision, Section 406(a)(2), provides that, if a fee agreement meets certain criteria, SSA must approve the agreement setting the amount of "contract-based fees * * * at the administrative level," *Gisbrecht*, 535 U.S. at 806, when the agency makes a decision favorable to the claimant. 42 U.S.C. 406(a)(2)(A); see Gov't Br. 4-5. Section 406(a)(2)(A)(ii) provides one of the relevant criteria: The "fee specified in the agreement" must not exceed the lesser of "25 percent of the total amount of [the claimant's] past-due benefits" or $6000. 42 U.S.C. 406(a)(2)(A)(ii); see Gov't Br. 5 n.2. That provision plainly does not establish an aggregate 25% cap for work both in agency proceedings and in court, because it addresses only the maximum fee that may be specified in an agency-approved fee agreement for work at the *administrative level*. The Amicus

agrees that Section 406(a)(2) merely governs the "fee for successful representation before the agency." See Br. 2; see *id.* at 37 (stating that Section 406(a)(2) provides a method for "approving fees at the agency level").

Finally, the third provision, Section 406(a)(4), provides that the agency "shall * * * certify for *payment* * * * to [the] attorney" "out of [the claimant's] past-due benefits * * * an amount equal to so much of the [agency-approved] maximum fee as does not exceed 25 percent of [the] past-due benefits." 42 U.S.C. 406(a)(4) (emphasis added); see Gov't Br. 8-9. That provision governs SSA's direct "payment" of (all or part of) the "maximum fee" to an attorney for representation in agency proceedings out of the claimant's own past-due benefits. It does not limit the amount of the "maximum fee" for those agency proceedings, much less establish a maximum aggregate fee cap for work both in agency proceedings and in court.

In fact, because Section 406(a)(4) provides that the agency shall certify for payment only "*so much of* the maximum fee *as* does *not exceed* 25 percent of such past-due benefits," 42 U.S.C. 406(a)(4) (emphasis added), Section 406(a)(4) itself demonstrates that the maximum fee sometimes *will exceed* 25% of past-due benefits. See Gov't Br. 18. If, as the Amicus contends, the aggregate amount of fees for both agency and court proceedings were capped at 25% of past-due benefits, the "maximum fee" specified in Section 406(a)(4) could never exceed 25% of past-due benefits. And if that were true, Section 406(a)(4)'s text limiting direct payment to "*so much of* the maximum fee *as does not exceed 25 percent of such past-due benefits*," 42 U.S.C. 406(a)(4), would be superfluous. The Amicus's position "thus runs afoul of the 'cardinal principle' of interpretation that courts 'must

give effect, if possible, to every clause and word of a statute.'" *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). The Amicus does not acknowledge Section 406(a)(4)'s significant text, which is sufficient in itself to demonstrate that the Amicus's position is incorrect.

2. The Amicus instead argues (Br. 13-19) that Section 406(a) and (b)—if read "together"—can be interpreted to support an aggregate 25% cap. But despite arguing that "the *text* of § 406(a) & (b), read together, supports a 25%-aggregate rule," Br. 13 (emphasis added; capitalization omitted), the Amicus pays scant attention to the actual text of either provision. That atextual approach to statutory interpretation is wrong.

a. Significantly, the Amicus does not identify any statutory text in Section 406(a) or (b)—or in any provision—that purportedly imposes a 25% aggregate cap. The Amicus notes (Br. 14-16) that Congress in Section 406(a) authorized SSA to regulate the maximum fees "for representation of claimants before the agency," Br. 14, and imposed in Section 406(b) a 25% past-due-benefits cap "for representation before the court," Br. 15. The Amicus then contends (Br. 16) that "nothing in either piece of legislation suggests that Congress envisioned that agency and court attorneys could collect up to 50% of a claimant's past-due benefits as a reasonable amount for attorney's fees." But the relevant point is that nothing in the text of either Section 406(a) or (b) imposes a 25% aggregate cap on such overall fees.

By authorizing SSA to approve an uncapped "reasonable" fee for work before the agency, 42 U.S.C. 406(a)(1); see Gov't Br 17-18, and by separately authorizing a court to approve a "reasonable" attorney's fee for work "before the court" up to "25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of [the court's] judgment," 42 U.S.C. 406(b)(1)(A), Congress necessarily provided—by virtue of simple addition—that the aggregate fee award may *exceed* 25% of the claimant's past-due benefits. Section 406's text thus is not "silent" on the question whether the total amount of both agency and court fees may exceed that 25% amount as the Amicus suggests (Br. 23). By separately authorizing fees that combined can exceed 25% of past-due benefits and by imposing no limitation on the "aggregate" amount of the fees (as Congress did elsewhere in Section 406, see 42 U.S.C. 406(a)(2)(C); Gov't Br. 17), the text of Section 406 authorizes the approval of agency and court fees that, in aggregate, can exceed 25% of past-due benefits.

b. The Amicus finds (Br. 17) it "telling" that SSA "withholds only one 25%-pool [of past-due benefits] from which payment of attorney's fees can be certified," even though Section 406(a) and (b) both permit the agency "to certify attorney's fees for payment" out of past-due benefits. The Amicus also argues (Br. 35-37) that fees approved by SSA in the fee-petition process are "tethered" to the 25% pool of past-due benefits out of which SSA will pay fees directly to an attorney. Br. 35. The Amicus is incorrect. Provisions governing the *approval* of attorney's fees by SSA and the courts are distinct and separate from those granting SSA authority to *withhold and directly pay* some or all of the fees that the agency or court has approved. And the 25% limit on the amount that SSA will directly pay to an attorney out of past-due benefits does not limit the amount that an attorney may charge the claimant. Indeed, as explained below, the 25% aggregate cap on the agency's direct payment is a creature of regulation, and

it reflects the agency's understanding that the aggregate amount of attorney's fees can and sometimes will exceed 25% of past-due benefits.

Two statutory provisions govern SSA's direct payment of agency- and court-approved fees out of past-due benefits: Section 406(a)(4) and Section 406(b)(1)(A). Section 406(a)(4) is mandatory: It provides that the agency "shall" certify for payment to an attorney "so much of the maximum fee as does not exceed 25 percent of [the claimant's] past-due benefits." 42 U.S.C. 406(a)(4). The "maximum fee," in turn, is defined elsewhere in Section 406(a) as the fee for work *before the agency*, which is set either by agency regulations governing the fee-petition process, 42 U.S.C. 406(a)(1), or by an agency-approved fee agreement, 42 U.S.C. 406(a)(2)(A).[1] Section 406(a)(4) thus requires that the agency pay directly to an attorney the approved fees for work in agency proceedings, up to 25% of the claimant's past-due benefits.

Section 406(b)(1)(A), however, is permissive: It provides that that the agency "may" certify the amount of the fee for "represent[ation] before the court." 42 U.S.C. 406(b)(1)(A); see *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (concluding that "Congress' use of the permissive 'may' in [a statutory provision] contrasts with

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[1] Congress authorized SSA to adopt rules to "prescribe the maximum fees" for work before the agency, which governs the attorney's fee determined in the fee-petition process. 42 U.S.C. 406(a)(1). And when the agency approves a fee-agreement under Section 406(a)(2), "the fee specified in the agreement shall be the maximum fee," 42 U.S.C. 406(a)(2)(A), unless the "maximum fee" is modified on administrative review, 42 U.S.C. 406(a)(3)(C). See Gov't Br. 23-24 (discussing modification of maximum fee on agency review).

[its] use of a mandatory 'shall' in the very same section"). SSA has accordingly exercised its discretion in this context to withhold a total of 25% of past-due benefits for direct payment of the approved agency and court fees. 20 C.F.R. 404.1730(a) and (b)(i); see Gov't Br. 9-10. But that discretionary determination about the maximum total amount the agency will withhold for direct payment to an attorney does not dictate the aggregate amount of fees that may be authorized by SSA and the courts. Quite the contrary, "[i]f the authorized fee exceeds the amount of withheld Title II benefits" that SSA will pay to the representative, "the representative must collect the balance from the claimant." SSA, Program Operations Manual System (POMS), GN 03920.017D.1 (July 25, 2012) (emphasis omitted), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920017.

c. Finally, the Amicus notes (Br. 17-18) that Section 406(a)(2) was enacted in 1990 to impose a 25% past-due-benefits cap on the amount of fees that an agency-approved fee agreement may specify for representing the claimant in agency proceedings. The Amicus suggests (Br. 18) that this 1990 enactment somehow ratified prior court of appeals decisions that had concluded that *other* provisions of Section 406 imposed a 25% aggregate cap. That contention is incorrect. Section 406(a)(2) itself does not establish any aggregate fee cap, and Congress's addition of a new means of setting an agency fee through agency-approved fee agreements under Section 406(a)(2) did not alter other statutory provisions to codify such an aggregate cap. Indeed, as we explain below, the legislative history of Section 406(a) and (b) makes clear that Congress understood that it did *not* impose an aggregate 25% cap on the total amount of fees for agency and court proceedings.

B. Section 406's Legislative History Reflects Congress's Intent Not To Impose A 25% Aggregate Cap

The Amicus argues (Br. 19-22) that Section 406's legislative history supports a 25% aggregate cap. The Amicus bases her conclusion (Br. 20) on a passage from a committee report concerning the 1965 enactment of Section 406(b)'s 25% cap on fees for "represent[ing] [the claimant] before the court," 42 U.S.C. 406(b)(1)(A), which noted the "occasion[al]" problem of inordinately large fees "in Federal district court actions," S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 122 (1965) (1965 Senate Report). Amicus then argues (Br. 21-22) that "[i]t is difficult, if not impossible," to conclude that a different Congress would later enact a statutory mechanism that allowed "combined" fees for work in agency proceedings and in court to exceed a 25% cap. Not only does Section 406's text show that Congress did precisely that, Section 406's legislative history does so as well.

Before 1965, Section 406 authorized SSA to set the maximum fees that could be charged for representing a claimant before the agency, but it included no provision governing fees for court proceedings. See 42 U.S.C. 406 (1964). In the absence of legislation, some courts concluded that Congress's grant of jurisdiction to review SSA decisions, 42 U.S.C. 405(g), allowed a reviewing court "to provide for the payment of counsel fees for conducting the litigation from any recovery obtained therein." *Folsom* v. *McDonald*, 237 F.2d 380, 382 (4th Cir. 1956) (per curiam); accord *Gonzalez* v. *Hobby*, 213 F.2d 68, 69 (1st Cir. 1954). In 1965, the Fifth Circuit, in *Celebrezze* v. *Sparks*, 342 F.2d 286, stated that it was "in full accord" with that reasoning. *Id.* at 288. Shortly thereafter, "Congress effectively codified *Sparks* by adding

a new subsection (b)(1) to [Section] 406 that allows withholding of past-due benefits to pay attorney's fees incurred in judicial proceedings," subject, of course, to Section 406(b)(1)'s 25% past-due-benefits cap. *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). But because Section 406(a) already had separately authorized attorney's fees for work in agency proceedings, Congress would have understood that its new 25% cap for fees for work in court would mean that the total amount of agency and court fees could exceed that 25% court-fee cap. Cf. *Hall* v. *United States*, 566 U.S. 506, 516 (2012) ("We assume that Congress is aware of existing law when it passes legislation.") (citation omitted).

Indeed, in 1990, when Congress added Section 406(a)(2)'s fee-agreement provisions to create a "streamlined process" as an alternative to Section 406(a)'s fee-petition process for setting the maximum fee for agency proceedings, see H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 933-934 (1990) (1990 Conf. Rep.), the legislative history makes clear that Congress understood that the total amount of attorney's fees would not be capped at—and thus could exceed—25% of past-due benefits. The 1990 legislation reorganized Section 406(a) by moving to Section 406(a)(4) the provisions governing SSA's certification and direct payment of the "maximum fee" from past-due benefits. Compare 42 U.S.C. 406(a)(4) (Supp. II 1990), with 42 U.S.C. 406(a) (Supp. I 1989). The accompanying Conference Report accordingly explained that, under the revision, once SSA has approved an attorney's fee for work in agency proceedings, the "attorney would be paid the approved fee out of the claimant's past-due social security benefits." 1990 Conf. Rep. 934. But the report then made clear that "if the attorney were *awarded a fee in excess of 25 percent* of

the claimant's past-due social security benefits, the amount payable to the attorney out of the past-due social security benefits [under Section 406(a)(4)] could not exceed 25 percent of those benefits." *Ibid.* (emphasis added). That explanation underscores that Section 406 means what it says, and that nothing in Section 406(a) or (b) imposes an aggregate 25% cap on attorney's fees.

C. The Amicus's Policy Arguments Are Misplaced And, In Any Event, Cannot Overcome The Statutory Text

The Amicus contends (Br. 23-31) that various policy considerations support a 25% aggregate cap. Those arguments are misplaced and, in any event, cannot overcome the text of Section 406, which imposes no such cap.

1. The Amicus argues (Br. 23-24) that if attorney's fees could be approved in an amount greater than the 25% of past-due benefits that SSA will pay directly to an attorney, then attorneys will need to collect the unpaid fees from their claimant-clients by either bringing suit or seeking to collect such fees out of the claimant's future social security benefits. That result, the Amicus argues (Br. 24), is "at odds with" the Social Security Act's goal of "ensur[ing] beneficiaries a protected source of income." That is incorrect.

As an initial matter, the Amicus misunderstands (Br. 24 & n.18) the possibility of collecting attorney's fees from a claimant's ongoing social security benefits, which can occur only in certain contexts to recover the amount of *past-due* benefits that the agency should have, but did not, pay directly to the attorney.[2] More importantly, however, the collection of properly approved

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[2] That possibility arises only when SSA "fail[s] to pay an authorized fee" directly to an eligible attorney out of the claimant's past-due benefits and instead releases to the claimant some or all of

"reasonable" fees by attorneys from the claimants who owe them is fully consistent with the Social Security Act. Attorneys must routinely collect reasonable bills from clients. Cf. *Astrue* v. *Ratliff*, 560 U.S. 586, 598 (2010) (noting in social-security context that attorneys can collect their fees from their clients by using "non-statutory (contractual and other assignment-based) rights"). And Congress specifically contemplated that attorneys would collect their fees from claimants by prohibiting the attorneys from "collect[ing]" such a fee only when the fee is "in excess of the maximum fee" approved by the agency, 42 U.S.C. 406(a)(5), or "in excess of that allowed by the court," 42 U.S.C. 406(b)(2).

As the Amicus correctly acknowledges (Br. 19, 20 n.16), two competing policy concerns are implicated in this context: (a) protecting claimants from excessive fees, and (b) providing adequate monetary incentives to attract "effective legal representation." Congress has itself drawn the policy line by imposing a cap on certain

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the past-due benefits that should have been withheld for the attorney. See POMS, GN 03920.055A (May 19, 2014), https://secure.ssa.gov/apps10/poms.nsf/lnx/0203920055; cf. *Hayes* v. *Commissioner of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018) (noting that an attorney would need to collect fees from the claimant "either directly or by utilizing the SSA's administrative overpayment mechanism," because "SSA had released the 25% of past-due benefits normally reserved to pay attorney's fees" before the attorney had moved for Section 406(b) fees). In that limited circumstance, if the attorney reports that he or she is unable to collect the fee from the claimant, SSA will "[p]ay the representative the maximum amount [it] should have paid from the claimant's [T]itle II past-due benefits" and will then "[i]nitiate overpayment recovery procedures from the claimant." POMS, GN 03920.055C. That process merely recovers the amount of past-due benefits (up to 25%) that should have been paid directly to the attorney in the first place and thus does not improperly reduce a claimant's ongoing benefits.

types of fees under Section 406 and by separately authorizing SSA and the courts to approve reasonable fees. The fact that Congress might have arguably struck that balance differently by adding an aggregate fee cap does not justify overriding the balance Congress struck here.[3]

2. The Amicus argues (Br. 24-26) that unless this Court imposes a 25% aggregate cap on attorney's fees, Section 406 will allow excessive fees. But Congress has provided ample safeguards for ensuring that fees under both Section 406(a) and Section 406(b) are not excessive.

a. As explained in the government's opening brief, when SSA sets a "reasonable" attorney's fee for proceedings before SSA under Section 406(a)(1), its regulations take into account the amount of fees sought for court proceedings as well as the Social Security Act's "purpose" of providing "a measure of economic security for the beneficiaries." Gov't Br. 22-23 (citation omitted). SSA may similarly adjust the fee established in a fee agreement under Section 406(a)(2) on administrative review, where SSA sets a "reasonable" fee for agency proceedings using the same criteria for reasonableness. *Id.* at 23-24 (discussing agency review under Section 406(a)(3)).

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[3] For similar reasons, the Amicus's repeated suggestion (Br. 11, 13-14, 22, 31, 42) that the Social Security Act should be "broadly" or "liberally" construed to favor the claimant is misplaced. This Court has not held that the Social Security Act should be construed in that manner. But even if it had, that interpretive proposition would not apply here, where the two countervailing goals of avoiding excessive fees and attracting counsel both advance claimants' interests. The appropriate course is therefore to honor the balance that Congress itself has struck in the text of Section 406(a) and (b), by interpreting the statute according to its terms.

b. With respect to fees for representation in court, the Amicus contends (Br. 24-26) that the absence of a 25% cap could produce "absurd results." Br. 24. In the Amicus's view (Br. 25-26), Section 406(b)'s authorization for a "court" to award reasonable fees up to 25% of past-due benefits authorizes both a district court and a court of appeals separately to award fees up to Section 406(b)'s 25% cap, which could potentially lead to awards of 50% of past-due benefits just for court proceedings. The Amicus further suggests (Br. 26) that, when added to agency fees, the total amount of allowed fees could account for "up to 75% of a claimant's past-due disability benefits." Those concerns are misplaced.

In many SSA cases in which an appeal is filed, the claimant will succeed in only one of the two courts involved.[4] Moreover, even if a claimant were to prevail in both district court and a court of appeals, Section 406(b) can be construed to allow only one fee award for all proceedings in court. In any event, Section 406(b)(1)(A) is itself properly construed to authorize the approval of

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[4] A court may award a reasonable fee as part of its "judgment favorable to a claimant" in an amount up to "25 percent of the total of the past-due benefits to which the claimant is entitled *by reason of such judgment*." 42 U.S.C. 406(b)(1)(A) (emphasis added). As a result, Section 406(b) authorizes court fees only when the claimant obtains a "favorable" judgment. Moreover, in a case in which the relevant judgment is favorable to the claimant but is not responsible for the full amount of the claimant's past-due benefits (*e.g.*, when it leads to an earlier disability-onset date that merely increases the amount of past-due benefits), the court-approved fee will be limited to 25% of the additional past-due benefits that a claimant obtains because of the favorable judgment.

court fees that in total do not exceed 25% of past-due benefits.[5]

But even if those limitations in Section 406(b) were to be ignored, the fees approved for judicial proceedings would still be subject to the overriding standard of "reasonable[ness]." 42 U.S.C. 406(b)(1)(A). And like SSA, courts may account for the total amount awarded for agency and court proceedings when determining a "reasonable fee" under Section 406(b). Gov't Br. 24-25. Indeed, the Amicus does not appear to dispute that Section 406 vests SSA and the courts with sufficient authority to determine "reasonable" amounts of fees that are not excessive in the aggregate. It is hardly absurd for Congress to have vested SSA and the courts with the

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[5] The Dictionary Act, 1 U.S.C. 1 *et seq.*, provides that, unless the statutory context requires otherwise, "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. 1. As a result, Section 406(b) is properly read to authorize the "court[s]" that render "judgment[s] favorable to a claimant" to "determine and allow as part of [their] judgment[s]" reasonable fees for "represent[ation] before the court[s]," "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment[s]." See 42 U.S.C. 406(b)(1)(A). Under that reading, Section 406(b) authorizes fees for work in district and appellate courts totaling no more than 25% of the claimant's past-due benefits. That reading of Section 406(b) comports with the concern, reflected when Congress enacted Section 406(b)'s 25% court-fee cap in 1965, that "attorneys * * * representing claimants in Federal district court actions"—which can include appeals in such actions—had "occasion[ally] charged what appear to be inordinately large fees" for such representation totaling "one-third to one-half[] of the accrued benefits." 1965 Senate Report 122. This Court need not resolve that question, however, because the authority of SSA and the courts to approve "reasonable" fees is sufficient to reject the Amicus's contention that an atextual 25% cap on aggregate agency and court fees is necessary to prevent excessive attorney's fees.

authority to make individualized determinations of reasonableness on a case-by-case basis.

c. The Amicus notes (Br. 27) that past-due benefits can continue to accrue through agency and court proceedings, such that the amount of past-due benefits that may be used to satisfy a claimant's attorney's fees will normally increase with time. But as this Court has already explained, "Congress was mindful" that "legal fees awardable from those benefits" could continue to increase "the longer the litigation persisted." *Gisbrecht*, 535 U.S. at 804. Not only does the 25% cap for Section 406(b) fees address that reality, *id.* at 804-805, so too does SSA's and the courts' more general authority to determine reasonable fees. See Gov't Br. 22-26. "If the benefits are large in comparison to the amount of time counsel spent on the case," both SSA and the courts may properly approve a reduced amount of fees relative to the total amount of past-due benefits. *Id.* at 808. Such a "downward adjustment" can be warranted to ensure the "reasonableness" of fees, even if the claimant and her counsel had previously agreed to a larger amount in a written fee agreement. *Ibid.* Similarly, if there is unwarranted delay in the proceedings, "a reduction [would be] in order so that the attorney will not profit from the accumulation of benefits during the pendency of the case." *Ibid.*

More generally, the authority of SSA and the courts to approve reasonable fees in this context, Gov't Br. 22-26, provides both tribunals with ample power to "assure that they yield reasonable results in particular cases." *Gisbrecht*, 535 U.S. at 807. In short, if the attorney's fee provisions of Section 406 are properly applied, they should avoid the type of excessive attorney compensation with which the Amicus is concerned.

3. Finally, the Amicus notes (Br. 27-31) that the government previously advocated a 25% aggregate cap on attorney's fees. The government explained to this Court in this case that it had previously filed briefs supporting a 25% aggregate cap; that the government's prior position had also been inconsistent; and that, in any event, its prior briefs supporting an aggregate cap simply failed to account for the salient statutory text. See Gov't Br. 20 n.8; Gov't Cert. Br. 22. The government has therefore corrected its position to account properly for that text. And as the briefing in this case reflects, no statutory basis exists for imposing an aggregate 25% past-due-benefits cap on the total amount of attorney's fees for agency proceedings and judicial review.[6]

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[6] The Amicus also criticizes (Br. 29-30) the government's position in this Court as inconsistent with what the Amicus states is the government's "duty to preserve the assets" of claimants as a "trustee" for social security claimants. That criticism is based on a misreading of this Court's observation that SSA has played a role in litigation concerning Section 406 fees "*resembling* that of a trustee for the claimants," because SSA had "no direct financial stake" in the quantum of fees an attorney may charge a claimant, *Gisbrecht*, 535 U.S. at 798 n.6 (emphasis added). That observation simply reflects that SSA has a legitimate policy-based interest in the proper interpretation of the governing fee provisions, and it therefore participates in fee proceedings to advocate for what it views as the proper result. SSA may therefore "resembl[e]" (*ibid.*) something like a trustee for a claimant when (as in *Gisbrecht*) its position in litigation aligns with the claimant's financial interest to minimize her attorney's fees. But the government is not actually a trustee and owes no trustee-based duties to a claimant in this context. Such "trust obligations" are "established and governed by statute," *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); see *id.* at 174, and no statutory provision imposes any such trust obligations on the government here.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018

No. 17-773

IN THE

Supreme Court of the United States

RICHARD ALLEN CULBERTSON,

Petitioner,

v.

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether the attorney's fees provisions of Title II of the Social Security Act, 42 U.S.C. § 406, cap the maximum amount of attorney's fees that may be paid under §§ 406(a) and 406(b) to 25% in the aggregate of a claimant's past-due benefits.

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I

STATEMENT OF THE CASE

A. Statutory Background

1. Attorney's Fees Under 42 U.S.C. § 406

The Social Security Act of 1935 ("Act") was enacted by Congress in the wake of the Great Depression "to provide for the general welfare." 79 Cong. Rec. 12793 (1935) (excerpt from Conference Report–Social Security H.R. 7260). The Act created a number of federal assistance programs for the elderly, infirm, and economically disadvantaged, and for certain of their dependents. Title II of the Act, 42 U.S.C. §§ 401 *et seq.*, established an insurance program providing old-age, survivor, and disability benefits for claimants and certain dependents. Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq.*, established a separate welfare program that provides supplemental security income (SSI) benefits to financially needy individuals who are aged, blind, or disabled, and certain dependents, regardless of their insured status. Benefits provided under the Act are intended to serve as a "safety net," assuring minimum income and an adequate standard of living. *See Social Security Programs in the United States*, 50 Soc. Sec. Bull. No. 4, at 6 (Apr. 1987).

Amendments to the Act, codified at 42 U.S.C. § 406, govern the payment of attorney's fees for Title II and Title XVI.[1] The provisions of § 406 govern attorney's

1. Although the payment of attorney's fees for Title XVI claims is governed by 42 U.S.C. § 1383(d), Congress has extended the Title II attorney's fee payment system to claims brought under Title XVI and incorporated the provisions of § 406 into § 1383(d). *See* Social

fees for successful representation of claimants at the administrative level under § 406(a) and in court under § 406(b). There is no allowance for the payment of attorney's fees when representation is unsuccessful.

a. Fees for Representation Before the Agency Under § 406(a)

At the administrative level, an attorney who represents a claimant before the Social Security Administration (SSA) (referred to as an "agency attorney") may collect a fee for his[2] representation (referred to as an "(a) fee" or an "agency fee") if such representation results in a favorable determination by the agency. *See* 42 U.S.C. § 406(a)(1), (2). An attorney has two options for recovering a fee for successful representation before the agency: the attorney may file with the SSA either a fee petition under § 406(a)(1) ("petition process") or a fee agreement under § 406(a)(2) ("agreement process").

Under the petition process, if an attorney's representation before the agency results in a determination favorable to the claimant, the Commissioner of Social

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Security Protection Act of 2004, Pub. L. No. 108–203, § 302, 118 Stat. 493, 519–21, *as amended by* Social Security Disability Applicants' Access to Professional Representation Act of 2010, Pub. L. No. 111–142, 124 Stat. 38. While the Commissioner correctly notes that the amendment to Title XVI incorporating 42 U.S.C. § 406 contains "modifications for SSI cases, 42 U.S.C. 1383(d)(2)(A), and separately addresses payment of such fees from past-due SSI benefits, 42 U.S.C. 1383(d)(2)(B)," (Respondent's brief 2-3 n.2), § 406's provisions remain applicable to SSI cases in all relevant respects.

2. For ease of reference, a generic attorney is referred to as "he" and a generic claimant as "she."

Security will upon request determine a reasonable fee for the attorney's services before the agency. *See* 42 U.S.C. § 406(a)(1). The maximum (a)(1) fee that may be charged is set by rules and regulations promulgated by the Commissioner. *Id.* An attorney may collect an (a)(1) fee even if no past-due benefits are awarded. *See* 20 C.F.R. 404.1725(b)(2). Cases in which a "favorable determination" is issued but no past-due benefits awarded typically involve overpayment or termination claims. *See Filing a petition when there is no past-due fund*, 2 Soc. Sec. Disab. Claims Prac. & Proc. § 21:83 (2nd ed.).

Alternatively, under the agreement process, if an attorney enters a fee agreement with his client setting a fee at the lesser of 25% of past-due benefits or $6,000[3] and files the agreement with the agency prior to the issuance of a favorable determination by the SSA, the Commissioner will automatically approve the fee at the time of the agency's decision. *See* 42 U.S.C. § 406(a)(2).

Under both the petition process and the agreement process, if the claimant is determined by the agency to be entitled to past-due benefits, the Commissioner will certify for payment out of those past-due benefits the attorney's fee in an amount up to 25% of the benefits. *See* 42 U.S.C. § 406(a)(4). The Commissioner is required to pay the agency attorney an (a) fee that she approves, but the payment of an (a) fee – under either (a)(1) or (a)(2) – may not exceed 25% of a claimant's past-due benefits. *Id.*

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3. 42 U.S.C. 406(a)(2)(A), 74 Fed. Reg. 6080.

b. Fees for Representation Before the Court Under § 406(b)

An attorney who represents a claimant in court on appeal from an agency determination (referred to as a "court attorney") may collect a fee for his representation (referred to as a "(b) fee" or a "court fee") if he obtains a favorable court decision. Congress has provided that a federal court may include as part of its judgment favorable to a claimant a reasonable fee for representation by an attorney before the court not in excess of 25% of the claimant's past-due benefits. *See* 42 U.S.C. § 406(b)(1)(A). The Commissioner is authorized to certify a court fee for payment to the court attorney "out of, and not in addition to, the amount of such past-due benefits." *Id.* Because a (b) fee is limited to 25% of past-due benefits, "attorneys may not gain additional fees based on a claimant's continuing entitlement to benefits." *See Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).

The attorney's fee provisions of §§ 406(a) and (b) establish the exclusive regime for obtaining fees from Social Security claimants. *See Gisbrecht*, *supra*, 535 U.S. at 795–96. "Collecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense." *Id.* at 796 (citing 42 U.S.C. §§ 406(a)(5), (b)(2); 20 CFR §§ 404.1740–1799).

Although both § 406(a) and § 406(b) allow for an award of attorney's fees of up to 25% of a claimant's past-due benefits, and for certification of payment of those fees directly to the attorney, the Commissioner withholds only one 25% pool of past-due benefits from which to pay both agency fees and court fees. *See* 42 U.S.C. § 406(a)(4).

1. Attorney's Fees Under EAJA

In addition to the availability of attorney's fees under 42 U.S.C. § 406, a prevailing claimant for Title II and XVI benefits may seek an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in any case in which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). Once a claimant has established her prevailing party status, the burden shifts to the Government to prove that its position in the litigation was substantially justified. *Id.*; *Scarborough v. Principi*, 541 U.S. 401, 403 (2004). Unlike § 406 fees, which are paid by the claimant, EAJA fees are paid by the Government.

EAJA fees are available to a prevailing party for an attorney's successful representation in court as well as before the agency, but EAJA fees for representation at the administrative level are limited to cases in which the agency representation results from a remand pursuant to sentence six of 42 U.S.C. § 405(g). Under sentence six, the court retains jurisdiction pending the Commissioner's determination of claimant's entitlement to benefits.[4] *See Sullivan v. Hudson*, 490 U.S. 877, 892 (1989); *see also Shalala v. Schaefer*, 509 U.S. 292, 297-301 & 297 n.2 (1993).

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4. In cases reviewing final agency decisions on Social Security benefits, the exclusive methods by which district courts may remand to the SSA are set forth in sentence four and sentence six of § 405(g). Under sentence four, a district court either affirms, modifies, or reverses the SSA's decision; under sentence six, the district court remands the case to the agency either with the Commissioner's consent or in light of additional evidence without any substantive ruling as to the correctness of the Secretary's decision, but only if the claimant shows good cause for failing to present the evidence earlier. *See Melkonyan v. Sullivan*, 501 U.S. 89, 98-99 (1991).

If an attorney is awarded both § 406 fees and EAJA fees for the same work, the attorney is required to refund the smaller fee to the client. *See* Act of Aug. 5, 1985, Pub. L. No. 99–80, § 3, 99 Stat. 186; *Gisbrecht*, 535 U.S. at 796. This savings provision "was intended to prevent attorneys from receiving double recovery under both the EAJA and § 406(b)." *Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1272 (11th Cir. 2010). To the extent an EAJA award offsets an award under § 406, the offset effectively increases the amount of past-due benefits the claimant will receive, up to 100% of the past-due benefits awarded. *Gisbrecht*, 535 U.S. at 796.

B. Factual Background

In 2008, Claimant Katrina F. Wood filed an application for disability benefits with the SSA under Title II, which the agency denied. *See* Administrative Record (A.R.) 10-21. After appointing Petitioner Richard Culbertson to act as her representative, A.R. 9, Ms. Wood appealed to the Appeals Council, A.R. 8, but the Appeals Council denied review, A.R. 4A-6.

In 2012, Ms. Wood retained Petitioner to file an appeal in the district court, and agreed to pay him a contingency fee of "25 percent of the total of the past due benefits to which [she] is entitled" in the event the court rendered judgment reversing or remanding and past-due benefits were awarded. J.A. 8-10. On appeal to the district court, the magistrate judge to whom the case was referred reversed the agency decision and entered judgment remanding the matter for further proceedings pursuant to sentence four of § 405(g).[5] J.A. 11; Pet. App. 4a. The

5. The parties consented to adjudication by a magistrate judge. *See* Pet. App. 3a, 4a n.2.

magistrate judge also granted Ms. Wood's unopposed motion for $4,107.27 in EAJA fees under § 2412(d) for Petitioner's representation in district court. J.A. 12-15.

On remand to the agency, Ms. Wood was awarded a total of $34,383 in past-due disability benefits ($30,871 for Ms. Wood plus $3,512[6] for her child as auxiliary beneficiary). J.A. 19; Pet. App. 4a. The agency withheld a total of 25% of Ms. Wood's past-due benefits ($8,595.75) to cover any payment of attorneys fees. J.A. 19, 30; Pet. App. 4a. Petitioner's request that he be authorized attorney's fees for his representation of Ms. Wood before the agency on remand was granted in part, and he was awarded an agency fee of $2,865. J.A. 19, 25-27; Pet. App. 4a-5a; Supp. C.A. App. 13.

Petitioner then moved the district court for additional attorney's fees under § 406(b) in the amount of $4,488.48 for his representation of Ms. Wood before the court. Supp. C.A. App. 4-10. The (b) fee that Petitioner requested equaled 25% of Ms. Wood's past-due benefits ($8,595.75) minus the EAJA award he had already been paid ($4,107.27). *Id.* at 5. Petitioner did not subtract from his request the $2,865 (a) fee he had been paid by the SSA for his agency work. Pet. App. 19a, 22a. Under Petitioner's calculation, Ms. Wood would receive a refund of attorney's fees in the amount of only $1,242.27 of her past-due benefits. Supp. C.A. App. 5.

The magistrate judge granted, in part, Petitioner's § 406(b) fee request. Pet. App. 18a-29a. Observing that

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6. Although the lower courts described the past-due auxiliary benefits as $4,340, Pet. App. 4a, 27a, the Commissioner explained that the correct amount is $3,512, D. Ct. Doc. 27 at 2.

binding precedent prevented a combined (a) and (b) fee in excess of 25% of a claimant's past-due benefits, the magistrate judge concluded that Petitioner's method of calculating his (b) fee request erroneously failed to deduct the $2,865 (a) fee he already had received. *Id.* at 20a, 22a-25. According to the magistrate judge, the proper method for calculating the (b) fee award was to subtract the $4,107.27 EAJA award that Petitioner had already received from the $8,595.75 in past-due benefits withheld by the Commissioner, and then subtract from that amount the $2,865 agency fee that Petitioner previously had been awarded under § 406(a), which would result in a net court fee award to Petitioner of $1,623.48. *Id.* at 26a. Under the magistrate judge's calculation, Ms. Wood would receive a refund of $4,107.27 of her past-due benefits – which reflects a reimbursement to Ms. Wood of the full EAJA award.

	Requested	Awarded
Past-Due Benefits Awarded	$ 34,383	$ 34,383
25% of Past-Due Benefits	$ 8,595	$ 8,595
§ 406(a) fees	$2,865	$2,865
§ 406(b) fees	$ 4,488	$ 1,623
EAJA Fees	$ 4,107	$ 4,107
Total Fees Paid to Petitioner:	$11,460 (33% of past-due benefits)	$ 8,595 (25% of past-due benefits)
Past-Due Benefits Refunded to Ms. Woods	$ 1,242	$ 4,107

Petitioner appealed the district court's attorney's fee award, and a panel of the Eleventh Circuit affirmed. Pet. App. 1a-17a. The panel explained that *Dawson v. Finch*, 425 F.2d 1192 (5th Cir. 1970), is binding precedent in the Eleventh Circuit that has interpreted § 406 as placing a 25% cap on combined § 406(a) and § 406(b) attorney's fees. Pet. App. 11a-12a & n.4, 14a. As the panel observed:

> The Dawson panel ruled that the language and legislative history of § 406(b) "clearly indicate[d]" that the 25% cap on fees paid out of past-due benefits was designed "to insure that the old age benefits for retirees and disability benefits for the disabled ... are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received."

Id. at 11a (quoting *Dawson*, 425 F.2d at 1195) (omissions in original). According to the panel, in ruling on Petitioner's (b) fee request, the district court properly "looked to *Dawson*'s holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits, and reduced [Petitioner's] fee request by the § 406(a) award he had received so as to limit his fee award to 25% of Ms. Wood's past-due benefits." *Id.* at 12a.

SUMMARY OF THE ARGUMENT

Congress intended when it enacted 42 U.S.C. § 406 and its amendments that attorney's fees for representation before the Social Security Administration under subsection (a) and attorney's fees for representation before the court under subsection (b) be limited in the aggregate to 25% of the past-due benefits awarded to the

claimant. Although § 406(a) and § 406(b) provide separate avenues for an award of attorney's fees for representation of a Social Security claimant, these fees are certified for payment out of a single source: the 25% of past-due benefits withheld by the Commissioner. *See* 42 U.S.C. § 406(a)(1), (a)(2), (a)(4), (b)(1)(A). When the statute is read as a whole, as it must be, it is evident that Congress placed a cumulative 25% cap on attorney's fees payable for successful representation of a Social Security claimant before both the agency and the court. This interpretation is reinforced by the Social Security rules and regulations that have been incorporated into the text of § 406, as well as from the series of amendments that laid out the framework allowing attorneys to collect fees for agency and court representation, all of which were designed by Congress to rein in the amount of fees Social Security attorneys could collect from their clients.

To the extent § 406 is ambiguous, the existence of an aggregate 25% cap is confirmed by the statute's legislative history. The legislative history reveals that Congress was deeply concerned that benefits awarded to Social Security claimants not be eroded by contingent fees sought by attorneys that could reach ⅓ to ½ of the claimant's accrued benefits, an amount Congress perceived to be "inordinately large." *See* Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965); Court-Appointed Amicus App. 1a-2a. By implementing a structure under § 406 for attorneys to collect fees, Congress did not intend to create a pathway for agency attorneys and court attorneys each to be awarded up to 25% of a disabled claimant's past-due benefits, fees that together could reach 50% – half – of the total past-due benefits awarded to the claimant. A 25%-aggregate rule furthers Congress's dual goals of

preventing benefits awarded to Social Security claimants from being consumed by unreasonably high attorney's fees, while at the same time providing an effective and efficient process for attorneys to collect reasonable fees for their services. *Id.*

The Social Security Act is a remedial statute that should be broadly construed and liberally applied in favor of the beneficiaries. *See, e.g., Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975). Broadly construing and liberally applying the relevant provisions of § 406(a) and § 406(b) in favor of the disability claimant, both agency and court fees are capped at an aggregate 25% of past-due benefits.

ARGUMENT

THE ATTORNEY'S FEES PROVISIONS OF TITLE II OF THE SOCIAL SECURITY ACT, 42 U.S.C. § 406, CAP THE MAXIMUM AMOUNT OF ATTORNEY'S FEES THAT MAY BE PAID UNDER § 406(a) AND § 406(b) TO 25% IN THE AGGREGATE OF A CLAIMANT'S PAST-DUE BENEFITS.

The question presented by the Petitioner is whether attorney's fees subject to 42 U.S.C. § 406(b)'s 25% cap on past-due benefits include only fees for representation in court or also fees for representation before the SSA. Petitioner thus frames the issue as whether the court fee provision of § 406(b) controls the agency fee provision of § 406(a). But that is not how the issue was framed either by the Fifth Circuit in *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970), or by the courts below in applying *Dawson*. Instead, the holding in *Dawson*, applied below, was that "42 U.S.C.A. 406 precludes the aggregate allowance of

attorney's fees greater than twenty-five percent of the past due benefits received by the claimant." 425 F.2d at 1192; Pet. App. 12a (observing that district court below "looked to *Dawson*'s holding that the combined § 406(a) and (b) fees cannot be more than 25% of past-due benefits"). The correct question, subsumed within Petitioner's question, is whether combined agency fees under § 406(a) and court fees under § 406(b) may exceed 25% of a claimant's past-due benefits.

Petitioner and Respondent argue that the language of the statute is plain that there can be multiple awards of up to 25% of a claimant's past-due benefits paid to attorneys for successful representation, and that agency attorneys and court attorneys *each* can be awarded up to 25% of a disabled claimant's past-due benefits, fees that together could reach 50% – *half* – of the total past-due benefits awarded to the claimant. Petitioner and Respondent far overstate the clarity of this statute.

Since the statute itself does not specifically state whether combined agency and court fees may exceed 25% of a claimant's past-due benefits, the answer lies in the text of § 406; the rules and regulations promulgated pursuant to that statute; the order in which amendments to the Social Security Act that led to the 25% cap on attorney's fees were enacted; and the clear expression of Congress's intent behind these amendments as set forth in both the text of the amendments and their accompanying legislative history. The Fourth, Fifth and Eleventh Circuits[7] are correct that the 25% pool of past-due benefits

7. *See Morris v. Soc. Sec. Admin.*, 689 F.2d 495 (4th Cir. 1982); *Dawson v. Finch*, 425 F.2d 1192 (5th Cir. 1970). *See also Bonner v.*

withheld by the Commissioner for payment of attorney's fees must cover agency and court proceedings in order to effectuate Congress' goal of protecting disabled claimants from excessive attorney's fees awards.

A. The Text of § 406(a) & (b), Read Together, Supports a 25%-Aggregate Rule.

To understand the interplay between agency fees awarded under § 406(a) and court fees awarded under § 406(b), one must begin by reading the relevant text of both provisions together. A statute must be read in its entirety; it is not intended to be read piecemeal because the meaning of statutory language depends on context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context") (citing *Massachusetts v. Morash*, 490 U.S. 107 (1989) and *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26, 109 (1988)). "[I]n expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

Specific to this case, "the Social Security Act is remedial or beneficent in purpose, and, therefore, to be 'broadly construed and liberally applied'" in favor of beneficiaries. *Cutler, supra*, 516 F.2d at 1285 (quoting *Gold v. Secretary of Health, Education and Welfare*, 463

Prichard, 661 F.2d, 1206, 1209 (11th Cir. 1981) (en banc) (holding that all decisions of the former Fifth Circuit announced prior to October 1, 1981, are binding precedent in the Eleventh Circuit).

F.2d 38, 41 (2 Cir. 1972)); *McCuin v. Sec'y of Health & Human Servs.*, 817 F.2d 161, 174 (1st Cir. 1987) ("[T]he Social Security Act ... is a remedial statute, to be broadly construed and liberally applied in favor of beneficiaries."); *Eisenhauer v. Mathews*, 535 F.2d 681, 686 (2d Cir. 1976) ("[T]the Social Security Act is to be accorded a liberal application in consonance with its remedial and humanitarian aims."). *Cf. City Bank Farmers Tr. Co. v. Irving Tr. Co.*, 299 U.S. 433, 444 (1937) (recognizing that remedial purpose of statute "demand[s] a liberal construction in favor of the claimants for whom relief was intended"). "In practical terms, when a Social Security Act provision can be reasonably interpreted in favor of one seeking benefits, it should be so construed." *Cunningham v. Harris*, 658 F.2d 239, 243 (4th Cir. 1981).

The original version of the Social Security Act enacted in 1935 made no provision for attorney's fees. 49 Stat. 620 (1935). Within four years, Congress amended the Act to permit the Social Security Board to prescribe by regulation the maximum fees attorneys could charge for representation of claimants before the agency.[8] Social Security Act Amendments of 1939, 53 Stat. 1372, codified at 42 U.S.C § 406. It is telling that Congress's primary concern, as evidenced by its requirement that such fees be capped, was not to ensure that attorneys were being

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8. The 1939 amendment provided:

> The Board may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Board under this title, and any agreement in violation of such rules and regulations shall be void.

53 Stat. 1372.

paid for their work before the agency; instead, it was to insure that they could not overbill their clients.

This same concern for protecting claimants from over-billing by attorneys was echoed 30 years later when Congress passed the Social Security Amendments of 1965, codified at § 406(b), for the first time regulating attorney's fees for representation before the court. *See* Pub. L. No. 89-97, Title III, § 332, 79 Stat. 403.[9] This amendment not only limited the availability of attorney's fees to only those cases in which the attorney's representation was successful, it also stipulated that a court fee be "reasonable" and imposed a maximum on the amount of an attorney's fee that could be collected, capping it at 25% of the claimant's past-due benefits. *See* 79 Stat. 403, as amended, 42 U.S.C. § 406(b); *Gisbrecht v. Barnhart*, 535 U.S. 789, 793 (2002). The passage of § 406(b) was yet another expression of Congress's intent that attorneys representing Social Security claimants be prevented from taking advantage of their clients by

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9. The 1965 Amendment provided:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

Social Security Amendments of 1965, Pub. L. No. 89–97, § 332, 79 Stat. 403. Subsection (b)(1).

charging them excessive fees. Certainly nothing in either piece of legislation suggests that Congress envisioned that agency and court attorneys could collect up to 50% of a claimant's past-due benefits as a reasonable amount for attorney's fees.

To address the dual concern that Social Security claimants receive effective legal representation, the 1965 Amendment sought to assure attorneys that they would receive their fees by including a provision allowing the Secretary of Health and Human Services (HHS) to certify court fees for payment out of the claimant's past-due benefits.[10] Two years later, in the Social Security Amendments of 1967, Congress added two sentences to § 406(a) that gave the Secretary similar authority to certify agency fees for payment out of past-due benefits, this time *requiring* that the Secretary certify the fees.[11] In addition, Congress capped the amount of agency fees

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10. The court fee certification provision states:

> [T]he Secretary *may* . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

H.R. 6675 (emphasis added).

11. The two sentences added by Congress in 1967 were:

> If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary *shall* ... certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of the past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

that could be certified at, once again, 25% of past-due benefits. *See* note 9 *supra*.

It is telling that, although § 406(a) and § 406(b) both permit the Commissioner to certify attorney's fees for payment out of the claimant's past-due benefits, the Commissioner withholds only one 25%-pool from which payment of attorney's fees can be certified.[12] If a single attorney could claim, and have certified, the entire 25% of withheld benefits, then the agency attorney and the court attorney would be racing against each other to be the first to have his fee certified for payment. It is difficult to believe that Congress intended to codify in a benefits statute a fee provision that has the practical effect of creating a race to the agency steps.

It also is significant that nearly 25 years later, in the Omnibus Budget Reconciliation Act of 1990, Congress amended § 406(a) to add subsection (a)(2) authorizing the "fee agreement" process.[13] This subsection, which directs the Commissioner to automatically approve certain agency fee agreements if the attorney's representation was successful, likewise includes a 25%-of-past-due-benefits cap. Once again, Congress is limiting fees in accordance with its stated goal of protecting claimants from

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Social Security Amendments of 1967, Pub. L. No. 90–248, Title I, § 173, 81 Stat. 877 (1968) (emphasis added).

12. *See* Hearings, Appeals, and Litigation Law Manual (HALLEX) I–1–2–9(B), I–1–2–71(A) n. 1; Program Operations Manual System (POMS) GN 03920.035(A) note, GN 03920.060(B)(3) note, *available at* http://www.ssa.gov.

13. *See* Pub. L. No. 101–508, § 5106(a), 104 Stat. 1388, 1388–266 (1990).

inordinately high attorney's fees, and, in accordance with its past legislation, defining excessive fees at anything over 25%.

What is of note is that, at the time this provision was enacted in 1990, the federal circuit courts of appeals were in unanimous agreement that there was an aggregate 25% cap on attorney's fees under § 406.[14] Congress presumptively was aware of this uniform application of the 25%-aggregate rule by the courts. *See, e.g., Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018), citing *Lorillard v. Pons*, 434 U. S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Consequently, in 1990, when Congress provided this additional avenue for a Social Security attorney to obtain a fee of up to 25% of past-due benefits, there was little reason for concern that an agency attorney and a court attorney *each* would seek *separate* fees of 25% of a claimant's past-due benefits. Instead, Congress was assured by the courts that an agency attorney and a court attorney would be required to share the 25% pool of accrued benefits.

Read in context and with a view toward implementing the purpose behind the amendments, Congress intended

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14. *See Davis v. Bowen*, 894 F.2d 271, 273 n. 3 (8th Cir. 1989) ("We note that those circuits which have addressed the issue agree that the aggregate of fees awarded at the judicial and administrative levels may not exceed twenty-five percent of past due benefits."); *Guido v. Schweiker*, 775 F.2d 107, 108 (3d Cir. 1985); *Morris, supra*, 689 F.2d at 497–98; *Webb v. Richardson*, 472 F.2d 529, 536 (6th Cir. 1972); *Dawson, supra*, 425 F.2d at 1195.

that attorney's fees be limited under § 406(a) and (b) to a total of 25% in the aggregate.

B. The Legislative History of § 406 Supports a 25%-Aggregate Rule.

While Congress's concern about overbilling is merely implicit in the text of the 1965 Amendment, it is explicit in the legislative history of the amendment. "[E]ven when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring). To the extent that Congress's silence on the issue presented in this case creates an ambiguity, one must resort to the legislative history of the statute. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("[S]ilence, after all, normally creates ambiguity. It does not resolve it.").

The 1965 Amendment was proposed by the Department of Health, Education and Welfare (HEW)[15] to address a dual concern of protecting Social Security claimants from inordinately large attorney's fees, while at the same time insuring that they receive effective legal representation. *See* Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965); Court-Appointed Amicus App. 1a-2a. According to HEW, Social Security attorneys occasionally charged "inordinately large" contingency fees for representing

15. In 1979, HEW was redesignated the Department of Health and Human Services ("HHS"). *See* 20 U.S.C. § 3508 (1982).

claimants in court, frequently reaching up ⅓ to ½ of a claimant's past-due benefits. When the bill came before the Senate Committee on Finance, the Committee adopted the concerns expressed by HEW in its report:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be *inordinately large fees* for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage *(frequently one-third to one-half) of the accrued benefits.*

S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N 1943, 2062 (emphasis added). *See Gisbrecht, supra*, 535 U.S. at 805 ("Congress thus sought to protect claimants against "inordinately large fees" and also to ensure that attorneys representing successful claimants would not risk 'nonpayment of [appropriate] fees.'" (quoting SSA Report 66).[16] Congress's desire to

16. As the Fifth Circuit in *Dawson* observed, the legislative history and text of § 406(b)

> clearly indicates that Congress sought, by amending the statute, to accomplish two goals. First, to encourage effective legal representation of claimants by insuring lawyers that they will receive reasonable fees directly through certification by the Secretary. And, second, to insure that the old age benefits for retirees and disability benefits for the disabled, which are usually the claimant's sole means of support, are not diluted by a deduction of an attorney's fee of one-third or one-half of the benefits received.

protect a Social Security claimant's past-due benefits from being cut by a third, or even in half, by attorney's fees could not have been more clear. As one scholarly article has discerned from the legislative history of the 1965 Amendment,

> Underlying Congress's concern with potential fee-gouging was Congress's implicit recognition of Social Security claimants as a unique, vulnerable class of litigants, who confront special difficulties in pursuing their claims and are in need of judicial oversight. Most claimants desperately need the past-due benefits they have gone without, and some--because of mental impairments, limited education, or the financial stress occasioned by the initial denial or cessation of benefits--may enter into fee agreements with their attorneys without a complete understanding of the nature of the arrangements or of their ability to negotiate the terms of such contracts.

Alison M. MacDonald & Victor, Williams, *In Whose Interests? Evaluating Attorneys' Fee Awards and Contingent-Fee Awards in Social Security Disability Benefits Cases*, 47 Admin. L. Rev. 115,145 (1995) (footnotes omitted).

It is difficult, if not impossible, to reconcile that after enacting a 25% cap on court fees in the 1965 Amendment designed to *prevent* "inordinately large" attorney's fees of up to 50% of past-due benefits, Congress would then turn around two years later and provide a mechanism to

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425 F.2d at 1195.

permit attorneys to do just that, i.e., to charge combined (a) and (b) fees of up to 50% of the past-due benefits that had been accruing while the disabled claimant was unable to work and earn a living.[17] On the contrary, by far the most reasonable interpretation of these amendments was that Congress imposed a 25% cap on (a) and (b) fees so that attorney's fees would be limited to 25% in the aggregate.

It was precisely this conundrum that drove the Fourth Circuit to adopt the 25%-aggregate rule in *See Morris v. Soc. Sec. Admin.*, 689 F.2d 495 (4th Cir. 1982). As *Morris* observed, there is "no reason to believe that the same desire to eliminate 'inordinately large fees,' which were 'frequently one-third to one-half' of a claimant's past-due benefits, that prompted Congress to adopt the 1965 amendment did not also inspire the passage of the parallel 1968 amendment." *Id.* at 497–98. *Morris* refused to adopt a construction of § 406 that "would allow an attorney to recover fifty percent of his client's accrued benefits in direct contravention of congressional attempts to foreclose contingent fee arrangements of one-third to one-half." *Id.* at 498.

Liberally construing the statute with an eye toward implementing Congress's goal of protecting a claimant's Social Security benefits from being eroded by excessive attorney's fees, the statute should be read to limit fees under § 406(a) and (b) to a total of 25% in the aggregate.

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17. *See Tamara B. v. Berryhill*, ___ F. Supp. ___, 2018 WL 3085200, at *3 (D. Vt. 2018) ("It would be strange indeed to believe that Congress would in 1965 denounce 50% contingency fees as excessive and enact a statute to stop them, and then, in 1968, pass a law with the effect of permitting 50% contingency fees.").

C. The Arguments in Favor of a 25%-Aggregate Rule Are Compelling.

i. Because (a) and (b) fees are paid from a single pool of past-due benefits, permitting such fees to exceed 25% in the aggregate creates a race to the agency.

Inarguably, § 406 does not expressly state whether an agency attorney and a court attorney may be paid combined fees of over 25% of the past-due benefits that a claimant is awarded. To the contrary, the statute is silent on this point. Yet one thing is clear: there is only one pool of past-due benefits from which agency fees and court fees may be paid by the Commissioner, and it is this same pool that is referenced in both § 406(a) and § 406(b). *See* 42 U.S.C. § 406(a)(4); 20 C.F.R. § 404.1720(b)(4), § 404.1730(a) & (b). The Commissioner withholds only *one* pool of 25% of past-due benefits from which to certify for payment all of the attorney's fees awarded under both § 406(a) for agency representation and § 406(b) for court representation. *See* HALLEX I-1-2-71(A) n. 1, *available at* https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-71.html ("SSA only withholds a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both."). *See also* HALLEX I-1-2-9(B), *available at* https://www.ssa.gov/OP_Home/hallex/I-01/I-1-2-9.html. There is no additional pool of benefits from which attorney's fees may be paid.

Because the Commissioner withholds only one pool of 25% of past-due benefits from which to pay attorney's fees for both agency and court representation, for an attorney to collect a fee that exceeds the 25% pool of withheld

disability benefits the attorney either would need to file a lawsuit against his disabled client, or seek to have his fees deducted from his client's future disability benefits under the agency's regulations governing overpayments.[18] The prospect of attorneys suing their aged, blind or disabled clients to collect fees out of their present or future benefits is directly at odds with the stated purpose of the Social Security Act to ensure beneficiaries a protected source of income. The chance this could occur suggests that Congress intended that agency attorneys and court attorneys share in the pool of past-due benefits withheld under §406(a) and § 406(b) for payment of attorney's fees.

ii. Rejecting the 25%-aggregate rule would lead to absurd results.

A reading of § 406 that would permit multiple, "stackable" attorney's fees awards of up to 25% of past-due benefits would lead to absurd results. Consider the text of § 406(b)(1) governing the award of court fees, which provides in relevant part:

> Whenever ***a court*** renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, ***the court*** may determine and allow as part of ***its judgment*** a reasonable fee for such

18. In the Sixth Circuit, which has rejected the 25%-aggregate approach, it is assumed that attorney's fees exceeding 25% of past-due benefits are recoverable from the claimant "either directly or by utilizing the SSA's administrative overpayment mechanism, whereby fees would be taken from [the claimant's future] monthly disability payments." *Hayes v. Comm'r of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018).

> representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

42 U.S.C. § 406(b)(1)(A) (emphasis added). The word "court" is not defined; it could refer to the district court, the court of appeals, or both. It appears to be universally accepted, however, that it refers to both the district court and the court of appeals: an attorney can obtain a favorable judgment from the district court[19], followed by a favorable judgment by the court of appeals. Court fees then may be sought from the district court, or the court of appeals, or both. *See, e.g., Lavender v. Califano*, 683 F.2d 133, 135 (6th Cir. 1892) (recognizing that § 406(b) fees may be awarded "where a claimant has been successful either in the district court, or upon appeal to this court"); *Brown v. Gardner*, 387 F.2d 345, 346 (4th Cir. 1967) (affirming § 406(b) fee for services rendered in the district court and on appeal); *Bailey v. Heckler*, 621 F. Supp. 521, 523 (W.D. Pa. 1985) (recognizing that a district court can approve attorney's fees for services performed in the trial or appellate courts).

Under the parties' non-aggregate view of § 406, because the award of district court attorney's fees and

19. On appeal to the district court of an SSA decision, a judgment may be rendered either by a district judge or by a magistrate judge by reference pursuant to 28 U.S.C. § 636.

appellate court attorney's fees are "distinct,"[20] each court attorney would be eligible to receive up to 25% of the claimant's past-due benefits. In other words, the attorney who represented the claimant before the district court is entitled to fees of up to 25% of the claimant's past-due benefits for obtaining the favorable district court judgment, *and* the attorney who represented the claimant before the court of appeals *also* is entitled to fees of up to 25% of the claimant's past-due benefits for obtaining a favorable court of appeals judgment. Consequently, under § 406(b)(1)(A), up to 50% of a claimant's past-due benefits could be awarded to court attorneys for successful representation before the district court and the court of appeals. Adding to that the up-to-25% "distinct" award of attorney's fees recoverable by the agency attorney, both the SSA and the court – acting independently in awarding fees – together would be authorized to award fees of up to 75% of a claimant's past-due disability benefits. No doubt this absurd result is not an outcome intended by Congress – nor should it be sanctioned by this Court. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (recognizing that when the plain text of a statute leads to absurd results, or to unreasonable results at variance with the policy of the legislation as a whole, this Court follows the law's purpose rather than its literal words).

iii. Logic supports the 25%-aggregate rule.

It also makes logical sense to read all of the relevant provisions of the statute as requiring that agency and court attorneys share the 25% pool of past-due benefits. If a claimant is successful before the SSA and need not

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20. Brief of Petitioner 14, 19, 23; Brief of Respondent 14.

either pursue or defend an appeal, agency fees can be awarded in an amount of up to 25% of the entire pool of past-due benefits that has accrued while the case was pending before the agency. On the other hand, when court proceedings are necessary to obtain a favorable outcome, and then court fees are sought in addition to agency fees, the claimant's past-due benefits continue to accrue while the court proceedings are pending – thereby increasing the past-due-benefits pool. In formulating the Social Security Amendments of 1965, "Congress was mindful . . . that the longer the litigation persisted, the greater the buildup of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed." *Gisbrecht*, 535 U.S. at 804. This passive accrual of benefits is not the result of the performance of either the agency attorney or the court attorney; it is simply a byproduct of the passage of time. Because agency fees are payable to an agency attorney for successful representation before the agency, and court fees are payable to a court attorney for successful representation before the court, it makes sense to divvy up the agency fees and court fees from the 25% pool of accrued benefit in a manner that recognizes that a portion of the accrued benefits is attributable to time the case was pending before the agency, while the other portion is attributable to time the case was pending before the court. The 25%-aggregate rule does just that.

iv. Respondent for decades agreed with *Dawson*'s 25%-aggregate rule.

Respondent acknowledges that it interpreted § 406 to limit agency fees and court fees to a combined 25% of a claimant's past-due benefits when it opposed this Court granting certiorari in *Dawson*, arguing in its brief in

opposition that *Dawson* had been correctly decided. Brief of Respondent 20 n. 8. The Secretary of HHS continued to side with *Dawson* and the 25%-aggregate rule over 35 years later, when the circuit courts first began to question the aggregate 25% cap. For example, in *Clark v. Astrue*, 529 F.3d 1211 (9th Cir. 2008), the Commissioner advised the Ninth Circuit that capping § 406(a) fees and § 406(b) fees at a combined 25% of past-due benefits "honors the congressional intent to limit the erosion of past-due benefits by attorney fees." Brief for Appellee at 15, *Clark*, *supra*, (No. 07-35056) (filed June 25, 2007). The Commissioner concluded:

> The statute is ambiguous, but repeatedly mentions a 25% cap on withheld past-due benefits for attorney fees. Given this language and congressional displeasure with attorney fees above 25% of a claimant's past-due benefits, this Court should affirm the district court's holding that combined attorney fees under §§ 406(a) and 406(b) must not exceed this amount.

Id. at 23. Likewise, the Commissioner's brief in *Wrenn ex rel. Wrenn v. Astrue*, 525 F.3d 931 (10th Cir. 2008), described the inequity that would result if the Tenth Circuit were to permit both an agency attorney and a court attorney to collect up to 25% of a disability claimant's past-due benefits:

> [T]he Commissioner believes that it is in the claimants's interest that this court does not establish a rule where there is a potential for 50% of a claimant's past due benefits to be used

> for attorney fees. Social Security "benefits are provided for the support and maintenance of claimants and their dependents, and not for the enrichment of members of the bar." *Rodriquez v. Bowen*, 865 F.2d 739, 745 (6th Cir. 1989).

(Brief for Appellee at 13, *Wrenn*, *supra* (No. 06-7088) (filed Nov. 3, 2006).

Although no change in the law or relevant circumstances appears to have prompted it, the Commissioner has now reversed her position and is siding in this case with Petitioner *against* the 25%-aggregate rule. By doing so, the Commissioner has placed herself in a curious position. As this Court has recognized, in Social Security fee disputes, the Commissioner serves in the role as a sort of trustee, charged with representing the interests of the claimant whose benefits pay for the attorney's fees. *See Gisbrecht* 535 U.S. at 798 n. 6 (observing that the Commissioner "plays a part in the fee determination resembling that of a trustee for the claimants") (citing *Lewis v. Sec'y of Health & Human Servs.*, 707 F.2d 246, 248 (6th Cir. 1983) ("In view of the humanitarian policy of the Social Security program to benefit the disabled, we agree that the Secretary retains an interest in the fair distribution of monies withheld for attorney's fees.") (internal quotation marks and citation omitted). The role of a trustee includes a duty to preserve the assets of the beneficiary. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572 (1985) ("One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets . . .."); Restatement (Second) of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use

reasonable care and skill to preserve the trust property"). By withdrawing her support for the 25%-aggregate rule, the Commissioner appears to have abandoned her role as trustee for the claimant in this case as her new position has the potential of reducing the amount of past-due benefits the claimant may retain – a result that would neither be in the claimant's best interests nor maximize the preservation of the claimant's assets.

The attorney for the claimant is in an equally awkward position. An attorney's argument in favor of overturning a limitation on fees that may be awarded from a client's past-due benefits at some point collides with the attorney's ethical duty to advance the interests of his client. *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) ("[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct . . .."). Opposing a 25% aggregate rule seemingly creates an irreconcilable conflict between an attorney's personal financial interest and his ethical obligation of zealous advocacy on behalf of the client.

Yet in Social Security fee disputes, claimants' attorneys have been characterized as the "real parties in interest." *Gisbrecht*, 535 U.S. at 798, n. 6; *Astrue v. Ratliff*, 560 U.S. 586, 600 (2010). It would seem that the *most* interested party, i.e., the party with the most at stake, would be the attorney's client. While attorneys no doubt have an interest in the amount of fees they are able to secure for their representation, a Social Security attorney's interest in maximizing his fees surely is not greater than his disabled client's interest in preserving her past-due benefits. After all, while it is doubtful that any one case is a lawyer's sole source of income, it is often

likely that a disability claimant's past-due benefits are the *claimant's* single source of income for the time-period during which the past-due benefits were accumulating.[21]

The upshot of this is that at no point in the process of resolving the question of what the attorney's fees should be in this case have Ms. Wood's interests been represented in the courts. Indeed, in all similar fee disputes, it is the attorney and the Commissioner who appear in court; it is never the claimant. This makes application of the rule calling for a broad and liberal construction of § 406 in favor of beneficiaries of special importance in this and like cases. *See, e.g., Cutler, supra*, 516 F.2d at 1285. Given the favored construction of the amendments to § 406, the order in which these amendments were enacted, and the goal of Congress in passing them, § 406 should be read to limit the payment of attorney's fees out of past-due benefits to 25% in the aggregate.

D. The Arguments Against a 25%-Aggregate Rule Are Unpersuasive.

1. Petitioner expresses concern that, "[s]hould the Eleventh Circuit's interpretation of § 406(b) be endorsed, fewer attorneys will be willing to represent Social Security claimants" because they "will lack the financial incentive." (Brief for Petitioner 20, 23). His dire prediction does not appear to be borne out by the data. In the past three years, the filings of Social Security

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21. Indeed, the past-due benefits awarded to Ms. Wood appeared to have been her sole source of income, as the administrate law judge noted in his initial denial of benefits that she has not worked since the onset of her disability. A.R. 15.

cases in the district courts within the three circuits that have adopted the 25%-aggregate rule has steadily *increased*: Fourth Circuit (from 1,470 in 2015; to 1,616 in 2016; to 2,067 in 2017); Fifth Circuit (from 758 in 2015; to 795 in 2016; to 861 in 2017) and Eleventh Circuit (from 1,896 in 2015; from 1,966 in 2016; to 2,083 in 2017). *See* Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-3 (2015-17), *available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2015.pdf;http://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_1231.2016.pdf; http://www.uscourts.gov/report-names/statistical-tables tables-federal-judiciary.[22] This trend likely is due to the fact that, even in circuits operating under the 25%-aggregate rule, Social Security attorneys are able to obtain court fees computed at an hourly rate of over $1,000 per hour. *See, e.g., Claypool v. Barnhart*, 294 F. Supp. 2d 829, 833 (S.D.W. Va. 2003) (approving § 406(b) fee with hourly rate of $1,433.12); *Sabourin v. Colvin*, 2014 WL 3949506 (N.D.Tex. 2014) (unpublished) ("de facto hourly rate of $1,245.55 per hour" was not an unearned windfall); *Melvin v. Colvin*, 2013 WL 3340490 *2 (E.D.N.C. 2013) (unpublished) (approving § 406(b) fee with hourly rate of $1,043.70); *Vilkas v. Comm'r of Soc. Sec.*, 2007 WL 1498115 (M.D. Fla. 2007) (unpublished) approving fees

22. Petitioner's argument also is undercut by his own experience, as he has maintained a Social Security practice for four decades yet "has never required a client to pay more than twenty-five percent of his past-due benefits for attorney fees for work done in Federal Court and at the administrative level." Supp. C.A. App. 28; *see also* https://www.richard culbertsonlaw.com/our-attorneys/ ("Since 1975, Mr. Culbertson has handled thousands of Social Security and Supplemental Security Income cases from pre application through the Federal Courts.").

translating to an hourly rate of $1,121.86). While Petitioner suggests that Social Security attorneys earn "modest compensation" from which they will not "get rich," Brief of Petitioner at 24, the data on which Petitioner relies shows that in 2013, at least one claimant representatives received $38.6 million in fees that year – $35 million of which he attributed to his law firm and the remaining $3.8 million he kept. *See* Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* App. C-1 & n. 2 (2015), *available at* https://oig.ssa.gov/ sites/ default/files/audit/full/pdf/A-05-15-15017.pdf. This level of income should provide an adequate financial incentive for attorneys to represent Social Security claimants.

Moreover, Petitioner's argument that a combined 25% cap is a disincentive to representing Social Security claimants is even less persuasive when the availability of EAJA fees is factored into the equation. As this Court has recognized, EAJA awards, which are paid by the Government, "provide an important additional incentive for attorneys to undertake Social Security cases." *Astrue v. Ratliff, supra*, 560 U.S. at 602. Whereas § 406 fees are limited to a percentage of back-due benefits awarded, EAJA fees are calculated under the lodestar method by multiplying the attorney's reasonable hours expended by hourly rate, and are payable regardless of whether back-due benefits are awarded. *Id.* To the extent an EAJA fee exceeds a § 406 fee awarded for the same work, the attorney may pocket the excess. The data, although scant, at least suggest a good possibility that EAJA fees will be available for successful court representation. In fiscal year 2010, EAJA fee were awarded in approximately 42% of Social Security cases in which the claimant prevailed, *see*

Astrue v. Ratliff, supra, 560 U.S. at 601 n. 2, amounting to $19,743,189.12 in payments, *see* https://www.ssa.gov/open/data/EAJA.html. By fiscal year 2017, that amount had more than doubled, to $41,952,601.90 in EAJA payments. *Id.*; *see also Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (recognizing that a sentence four remand under § 405(g) generally confers "prevailing party" status for EAJA purposes); *Marshall v. Comm'r of Soc. Sec.*, 444 F.3d 837, 842 (6th Cir. 2006) (a sentence six remand followed by successful administrative proceedings is sufficient to confer prevailing party status).[23] The likelihood of obtaining EAJA fees for successful representation, payable over and above § 406 fees and regardless of whether past-due benefits are awarded, provides an attractive inducement to Social Security attorneys.

2. Petitioner and Respondent both argue that agency fees and court fees cannot be limited to an aggregate 25% of past-due benefits because an agency attorney may obtain an agency fee under § 406(a)(1)'s fee petition process in

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23. Although more recent data is not readily available, in 1998 GAO reported to Congress:

> From its inception in fiscal year 1982 through fiscal year 1994 (the last year central reporting of governmentwide data was required), more than 6,200 applicants were awarded about $34 million under EAJA's administrative and judicial processes for reimbursement of attorneys' fees and related expenses. Of the $34 million, applications involving the Social Security Administration (SSA) accounted for at least 83 percent of the claims granted and 48 percent of the amounts awarded.

Equal Access to Justice Act: Its Use in Selected Agencies, HEHS-98-58R, pp. 2-3 (Jan. 14, 1998), *available at* https://www.gao.gov/products/HEHS-98-58R.

excess of 25% of past-due benefits. (Brief for Petitioner 15; Brief for Respondent 17-19). To the contrary, finer analysis indicates that this blanket statement is overbroad. To be sure, where past-due benefits are not available yet the outcome of the representation was nevertheless successful – such as in termination or overpayment cases – there is no monetary cap on fees. In these cases, there are no past-due benefits to cap. But in cases where past-due benefits *are* awarded, an examination of the statute and its implementing regulations reveals that agency fees sought under (a)(1)'s petition process are tethered to a limitation of 25% of past-due benefits.[24]

This 25% limitation is derived from two sentences (six and seven) of § 406(a)(1), which provide:

> ***The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees*** which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in

24. It is irrelevant that the regulations permit an award of attorney's fees "even if no benefits are payable." (Brief of the United States at pp. 17-19) (quoting 20 C.F.R. § 404.1725(b)(2)). The issue presented in this case does not arise when no past-due benefits are awarded.

> connection with such claim, fix ***(in accordance with the regulations prescribed pursuant to the preceding sentence)*** a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

42 U.S.C. § 406(a)(1) (emphasis added). As the highlighted phrases explain, the statute delegates to the Commissioner the authority to determine by rules and regulations the maximum § 406(a)(1) fee that may be authorized when an agency attorney petitions to be paid a fee under the fee petition process. Further, the Commissioner is required to fix the maximum fee "in accordance" with the regulations that prescribe the maximum fee, meaning, the § 406(a)(1) fee must be set "in a way that agrees with or follows" the rules and regulations. Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/in%20accordance%20with.

The Commissioner has done exactly that. The regulations that fix the maximum § 406(a)(1) fee are 20 C.F.R. § 1720 and § 1730. Section 1720(a), which governs agency fees, directs that an attorney "may charge and receive a fee for his or her services as a representative ***only*** as provided in paragraph (b) of this section." 20 C.F.R. § 404.1720(a) (emphasis added). Section 404.1720(b), in turn, limits an agency attorney's receipt of a § 406(a)(1) fee to the amount authorized by the Commissioner.[25]

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25. "The representative must file a written request with us before he or she may charge or receive a fee for his or her services." 20 C.F.R. § 1720(b)(1). "We decide the amount of the fee, if any, a representative may charge or receive." 20 C.F.R. § 1720(b)(2).

Section 404.1720(b)(3) specifically provides that an agency attorney "must not charge or receive any fee unless [the Commissioner has] authorized it," and, further, that the agency attorney "must not charge or receive any fee that is more than the amount [the Commissioner] authorize[s]." 20 C.F.R. § 404.1720(b)(3). If agency representation includes an award of past-due benefits,[26] the Commissioner "will pay the authorized fee, or a part of the authorized fee, directly to the attorney . . . out of the past-due benefits, *subject to the limitations described in [42 C.F.R.] § 404.1730(b)(1).*" 20 C.F.R. § 404.1720(b)(4) (emphasis added). The "limitations described in § 404.1730(b)(1)" are that, if the Commissioner renders a favorable decision, the Commissioner "will pay the [agency attorney] out of the past-due benefits, the *smaller* of the amounts [of 25% of the total past-due benefits] or [the amount of fee the Commissioner sets]."

What all of this means is that the Commissioner has, by regulation, set the maximum fee under § 406(a)(1) when past-due benefits are awarded to the claimant as 25% of those past-due benefits.

Even if these provisions cannot be read to place a 25% cap on agency fees awarded under § 406(a)(1), it is apparent from the legislative history that Congress intended to replace the (a)(1) petition process – an ungainly method for approving fees at the agency level – with the (a)(2) agreement process – a more efficient, "streamlined" procedure. *See* H.R. Conf. Rep. 101-964,

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26. Not every successful agency representation includes an award of past-due benefits, for example, if the favorable decision is in a termination or overpayment case. *See supra* p. 35.

reprinted in 1990 U.S.C.C.A.N. 2374, 2638-39 ("The provision would generally replace the fee petition process with a streamlined process in which SSA would approve any fee agreement jointly submitted in writing and signed by the representative and the claimant if the Secretary's determination with respect to a claim for past-due benefits was favorable and if the agreed-upon fee did not exceed a limit of 25 percent of the claimant's past-due benefits up to $4,000."). Today, the fee agreement process is by far the preferred method used for obtaining agency fees. *See, e.g.*, Thomas E. Bush, *Social Security Disability Practice: The Fee Agreement Process for Approval of Attorney Fees, excerpted at* http://jameseducationcenter.com/articles/disability-attorney-fees/#Two_Fee_App (observing that "the fee agreement process, which provides for streamlined approval and payment of attorney fees, works better in the vast majority of cases").[27] A Social Security attorney generally will rely on the petition process when past-due benefits have been awarded only when (1) there is no written fee agreement; (2) the SSA did not approve a fee agreement; or (3) the attorney's representation terminated before the SSA favorably decided the claim. *See Disability Secrets: When Can a Disability Lawyer Use a Fee Petition to Get Paid? available at* https://www.disability secrets.com/resources/when-can-a-disability-lawyer-use-a-fee-petition-get-paid.

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27. According to the SSA's Single Payment System (SPS) used to make fee payments to claimant representatives, only 4% of fee payments were coded as having been obtained pursuant to the petition process in fiscal year 2012. *See* Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-13-13061, *Audit Report: Controls over Claimant Representative Fee Petition Payments* 3 n. 4 (2015), *available at* https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-13-13061.pdf.

3. Petitioner points to a Social Security instruction manual explaining that attorney's fees could be awarded in excess of 25% of past-due benefits as evidence that "closes the door on any suggestion that administrative and court representation fees share a single fee cap." Brief for Petitioner 17. Although Petitioner is correct that SSA's Program Operations Manual System (POMS) advises that "the court fee and the administrative fee combined may exceed 25 percent of the [past-due benefits," POMS GN 03920.050(C), the POMS is merely a guidance manual directed at Social Security claims processors intended to instruct them on how to perform their jobs. *See* https://secure.ssa.gov/poms.nsf/home!readform (describing POMS as a "source of information used by Social Security employees to process claims for Social Security benefits."). The portion of the instruction manual to which Petitioner refers merely provides guidance to SSA employees on how to handle a situation where combined agency fees and court fees exceed 25% of past-due benefits, presumably in jurisdictions where this is permitted. In other words, this manual does not purport to offer a legal opinion on whether § 406 provides a 25% cap on combined (a) and (b) fees; it simply attempts to advise employees on how to process claims consistent with the various divergent circuit court rules. However, to the extent this Court agrees with Petitioner regarding the weight to be given to the SSA's opinion, this Court should affirm the judgment of the Eleventh Circuit because it has been the consistent position of the SSA for the past 48 years – at least since *Dawson* was decided in 1970 – that § 406 caps combined (a) fees and (b) fees at 25%. *See infra* pp. 27-29.

4. Petitioner suggests that there is no need to worry that attorneys will seek excessive fees in the absence of

a 25%-aggregate cap because § 406(a)'s "reasonableness inquiry" has "real teeth and "effectively check[s] excessive fees for representation before the agency." Brief for Petitioner 14 n. 2 & 15. Respondent offers that is "unlikely" that combined fees will reach 50% of past-due benefits "if the agency and the courts property discharge their responsibility" to award reasonable fees. Brief of Respondent 22. Yet these safeguards have not prevented Social Security attorneys in circuits that have rejected the 25%-aggregate rule from walking away with combined (a) and (b) fees approaching 40% and even 50% of past-due benefits. *See Booth v. Comm'r of Soc. Sec.*, 645 F. App'x 455, 457 (6th Cir. 2016) (after agency awarded attorney a $6,000 (a) fee, court awarded a (b) fee of 25% of past-due benefits, resulting in combined fees totaling over 47% of past-due benefits); *Campbell v. Astrue*, 2009 WL 2342739 (E.D. Ky. 2009) (unpublished) (after claimant's attorney was awarded a $5,300 (a) fee, the court awarded a $9,362 (b) fee, amounting to 39% of claimant's past-due benefits). *See, e.g., Ellick v. Barnhart*, 445 F. Supp. 2d 1166, 1168–69 (C.D. Cal. 2006) (reporting that survey of 43 cases revealed that "[s]lightly more than half" of the §406(b) requests yielded court fees alone of 25% of past-due benefits).[28]

5. Amicus NOSSCR seems to suggest that the ramifications of rejecting a 25%-aggregate rule are insignificant, because attorneys who have been able to secure exorbitant fees will not be able to collect them from their disabled clients. Brief of Amicus NOSSCR 17018.

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28. These cases appear to contradict Amicus NOSSCR's suggestion that "[a]n attorney in a Circuit without a cumulative cap ordinarily requests that a court authorize a § 406(b) fee that reflects a cumulative cap" and its discussion regarding the "prevailing market rate" for (b) fees. Brief of Amicus NOSSCR 13.

Putting aside the dubious suggestion that this type of consideration should influence the decision in this case, it is by no means clear that disabled claimants would not be hounded by their lawyers in perpetuity over their future disability or SSI benefits, or any other potential sources of income, including inheritances, they might have the good fortune to acquire. As mentioned above, the Sixth Circuit has suggested that attorney's fees in excess of the amount withheld by SSA might be treated as an overpayment and withheld from a claimant's future benefits. *See supra* note 18 (quoting *Hayes*, 895 F.3d at 452). As for Amicus NOSSCR's fear that 42 U.S.C. § 407(a) would prevent collection of attorney's fees from claimants, this does not appear to be the case since such fees stem from past-due benefits, not future benefits. *Cf. Celebrezze v. Sparks*, 342 F.2d 286, 288 (5th Cir. 1965) (concluding that § 407(a) applies only to a "'future payment" whereas an attorney's fee deals solely with past due benefits).

6. Petitioner and Amicus NOSSCR hypothesize that under a 25%-aggregate rule, an attorney might obtain a favorable result in court and then discover that an agency attorney has already "used up" the withheld past-due benefits. Brief for Petitioner 20; Brief for Amicus NOSSCR 10-11. In practice, there are safeguards to prevent this from happening. First, in circuits operating under the 25%-aggregate rule, such as the Eleventh Circuit, it is standard practice for an attorney who accepts representation of a claimant in court to enter an agreement ahead of time delineating how any withheld benefits will be split between counsel. Second, since the agency when ruling on an (a) fee request is required to consider the amount of any (b) fee the attorney plans to request from the court, *see* 20 C.F.R. § 404.1725(a)(4); 20

C.F.R. § 404.1728(a), and since the court when ruling on a (b) fee request is likewise authorized to consider the amount of any (a) fee the attorney plans to request from the agency, *see* Brief of Respondent 24-25, there would be no opportunity for the agency attorney to use up the pot of past-due benefits. Moreover, it is important to weigh the risks. While the risk to an attorney of not receiving a fee is minimal, the impact on a claimant's well-being of having her income eroded by attorney's fees can be significant. In any event, because the perceived problem in the hypothetical is at best illusory, it should not drive the Court's decision in this case.

7. Finally, Petitioner and Respondent both argue that had Congress intended to limit agency and court fees to 25% in the aggregate, it would have said so. (Brief for Petitioner 13; Brief for Respondent 16). But the converse is equally true: had Congress intended that separate 25%-fees could be awarded under both § 406(a) and § 406(b), it could have said that as well. At best, the statute is ambiguous on this point. This ambiguity must be resolved in favor of Ms. Wood, because a broad construction and liberal application of the attorney's fees provisions of § 406 would further the remedial and beneficent purposes of the Social Security Act, rather than defeat it. *See Cutler, supra*, 516 F.2d at 1285 (quoting *Gold, supra*, 463 F.2d at 41).

In sum, Congress intended when it drafted 42 U.S.C. § 406 and its amendments to limit combined agency fees under subsection (a) and court fees under subsection (b) to no more than 25% of a claimant's past-due benefits. This is evident from the text of the amendments to § 406 as well as their legislative history, and effectuates

Congress's goal of protecting Social Security claimants from a disproportionately large reduction of their benefits while at the same time ensuring their ability to secure legal representation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 2018

APPENDIX

APPENDIX

Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Congress, 1st Sess., Part One, p. 513 (1965):

Explanation of amendment

This amendment is designed to alleviate two problems that have arisen with respect to representation of claimants by attorneys. The first relates to the need to encourage effective legal representation of claimants. Under the provisions of section 205(i) of the Social Security Act, accrued amounts of benefits that are due to a claimant as a result of a court decision are to be paid directly to him. Under section 207, assignment of benefits is prohibited. Attorneys have complained that such awards are sometimes made to the claimant without the attorney's knowledge and that some claimants on occasion have not notified the attorney of the receipt of the money, nor have they paid his fee.

Another problem that has arisen is that attorneys have on occasion charged what appeared to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these inordinately large fees result from a contingent fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half of the accrued benefits). Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, may be payable if the claimant wins his case.

Appendix

The amendment would provide that whenever a court renders a judgment favorable to a claimant, it would have express authority to allow as part of its judgment a reasonable fee (not in excess of 25 percent of accrued benefits) for services rendered in connection with the claim. Any violation would be made subject to the same penalties as are provided in section 206 of the law for charging more than the maximum fees prescribed in regulations (20 CFR 404.975) for services rendered in proceedings before the Secretary. In addition, as a specific exception to section 205(i), the Secretary would be permitted to certify the amount of the court-approved fee to the attorney out of the amount of accrued benefits. As a result, claimants would be insured more effective legal representation and also would be protected from being charged exorbitant fees.

No. 17-773

In The
Supreme Court of the United States

RICHARD A. CULBERTSON,

Petitioner,

v.

NANCY A. BERRYHILL,
Deputy Commissioner for Operations,
Social Security Administration,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a nonprofit, voluntary membership association. NOSSCR has more than 2,900 members, mostly attorneys, who represent claimants seeking disability and other benefits under the Social Security Act before the Social Security Administration (Agency). Any fee a claimant's attorney or non-attorney representative receives from a claimant for work before the Agency must be authorized under 42 U.S.C. § 406(a). In Fiscal Year 2019, the Agency expects to receive 2.4 million initial claims for disability benefits; dispose of 761,000 requests for hearings before administrative law judges; and complete 136,000 Appeals Council reviews.[2]

NOSSCR members who are attorneys represent claimants in civil actions for judicial review of the Agency's administrative denials of benefit claims. *See* 42 U.S.C. § 405(g). Any fee a claimant's attorney receives for work in court must be authorized under 42 U.S.C. § 406(b) or awarded pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Agency anticipates that, in Fiscal Year 2019, claimants

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[1] Under Supreme Court Rule 37.6, NOSSCR states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than NOSSCR and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs. Respondent has consented to NOSSCR filing an amicus brief.

[2] Soc. Sec. Admin., *Fiscal Yr. 2019 Budget Overview*, at 3, https://www.ssa.gov/budget/FY19Files/2019BO.pdf. All sites visited July 20, 2018.

will file 18,000 new civil actions under 42 U.S.C. § 405(g).[3]

NOSSCR has three significant interests in this case. First, the case concerns the exclusive way that representatives, including NOSSCR members, may be paid from claimants' past-due benefits for their work before the Agency. *See* 42 U.S.C. § 406(a). "[C]laimants who had a representative – either an attorney or a nonattorney representative – were allowed at a rate 2.9 times higher than a typical claimant with no representative."[4] Fees paid to claimants' attorney and non-attorney representatives enable the representatives to show the Agency that claimants are entitled to benefits.

Second, the case concerns the exclusive way that attorneys, including NOSSCR members who are attorneys, may be paid, for their work in court, from claimants' past-due benefits, in particular, the amount of the fee for that work. *See* 42 U.S.C. § 406(b). NOSSCR has an interest in its attorney members receiving reasonable § 406(b) fees that provide a sufficient incentive to challenge on judicial review the Agency's denials of benefits.

Third, the case involves the interplay between a fee under § 406(b) and an EAJA fee. The potential to

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[3] *Fiscal Yr. 2019 Budget Overview*, at 3.

[4] U.S. Gov't Accountability Office, *Soc. Sec. Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearing Decisions* (Dec. 2017), at 24 (footnote omitted), https://www.gao.gov/assets/690/688824.pdf.

obtain EAJA fees provides an important incentive for attorneys to represent in court claimants challenging the Agency's denials of benefits. Indeed, EAJA fees may be as important an incentive as § 406(b) fees for attorneys to represent claimants in court.

SUMMARY OF THE ARGUMENT

Petitioner and Respondent have similar answers to the question presented. Brief for Petitioner at 6-30, *Culbertson v. Berryhill*, No. 17-773 (July 16, 2018) (Pet'r Br.); Brief for Respondent Supporting Reversal and Remand at 14-22, *Culbertson v. Berryhill*, No. 17-773 (July 16, 2018) (Resp't Br.). When a court determines a reasonable attorney fee to be paid from a Social Security claimant's past-due benefits for the attorney's work in court under 42 U.S.C. § 406(b), the 25% cap on such fees includes only fees authorized under § 406(b) and not also any Agency-authorized fee under 42 U.S.C. § 406(a) for that attorney's work (or another attorney's work) during the administrative proceedings. In other words, there is no cumulative cap on a § 406(b) fee including any § 406(a) fee and any § 406(b) fee.

While Respondent recognizes that the Social Security Act does not include a cumulative cap, Respondent argues that a court may impose a de facto cumulative cap through the exercise of discretion. Resp't Br. 22-26. To the contrary, except for a case remanded to the Agency under sentence six of 42 U.S.C. § 405(g), when determining a reasonable § 406(b) fee for an

attorney's work on judicial review, a court has no jurisdiction to set a lower or a higher fee based on the court's perceived value of that attorney's or another attorney's work during administrative proceedings. If a court concludes that the Agency's § 406(a) fee was unreasonably low, a court has no authority to increase the amount of the § 406(b) fee it authorizes to correct, in the court's view, the Agency's mistake. Similarly, if a court concludes that the Agency's § 406(a) fee was unreasonably high, a court has no authority to decrease the amount of the § 406(b) fee it authorizes to correct, in the court's view, the Agency's error. Just as a court has exclusive jurisdiction to determine a reasonable § 406(b) fee for an attorney's work on judicial review, the Agency has exclusive jurisdiction to determine a reasonable § 406(a) fee for an attorney's work during administrative proceedings.

If the Court holds that there is no cumulative cap, the impact of the Court's holding should be limited, for both claimants and their attorneys. Amicus explains that the prevailing market rate for a 42 U.S.C. § 406(b) fee approximates a cumulative cap today even where not required by Circuit precedent.

Amicus also addresses the Savings Provision of 42 U.S.C. § 406(b). *See* Pub. L. No. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. The Savings Provision provides that an attorney must refund to a claimant the smaller of an authorized § 406(b) fee and an EAJA fee that the attorney receives. While the precise operation of the Savings Provision is not included in the question presented, Amicus describes how the Savings Provision

operated in the courts below with a cumulative cap and how it might operate in this case without a cumulative cap.

ARGUMENT

I. Because There is No Cap on an Administrative Fee Under 42 U.S.C. § 406(a), the Cap on a Court Fee Under 42 U.S.C. § 406(b) to 25% of Past-Due Benefits Does Not Include Both § 406(a) and § 406(b) Fees.

Under 42 U.S.C. § 406(a), the Agency authorizes payment to an attorney (or non-attorney representative) a fee for the attorney's work before the Agency.[5] 42 U.S.C. § 406(a); *see, generally, Gisbrecht v. Barnhart*, 535 U.S. 789, 793-96 (2002).[6] Under 42 U.S.C. § 406(b), a court authorizes payment to an attorney a fee from a claimant's past-due benefits for the attorney's work in court. 42 U.S.C. § 406(b). Because there is no statutory cap on the amount of a § 406(a) fee that the Agency may authorize for work performed before the Agency, there is no statutory cumulative cap on § 406(a) and § 406(b) fees that a court may award under § 406(b) for work on judicial review. *See Program Operations Manual System* (*POMS*), GN § 03920.017(D)(5) ("The court

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[5] For simplicity, Amicus refers below only to attorney representatives.

[6] *See also* Soc Sec. Admin., *SSA's Fee Authorization Process*, https://www.ssa.gov/representation/overview.htm.

fee is in addition to the fee, if any, SSA authorizes for proceedings at the administrative level.").

Section 406(b) is the only way that an attorney may receive a fee from a claimant's past-due benefits for the attorney's work in court. 42 U.S.C. § 406(b). Section 406(b) limits the fee that a court may determine for an attorney's work in court to a contingent fee of 25% of past-due benefits:

> Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment. . . .

42 U.S.C. § 406(b)(1)(A); *see, generally*, *Gisbrecht*, 535 U.S. at 799-809. Section 406(b) does not include a cumulative cap; it does not refer to § 406(a). *See* 42 U.S.C. § 406(b).

Section 406(a) of 42 U.S.C. provides two methods by which a claimant's attorney may obtain a fee for his or her work before the Agency. The first method is the "fee petition" process. Under this process, when the Agency favorably decides a claim, 42 U.S.C. § 406(a)(1) authorizes the Agency to "fix . . . a reasonable fee to compensate such attorney for the services performed by him [or her] in connection with such claim." 42 U.S.C. § 406(a)(1). Under the regulations governing the "fee petition" process, the attorney must submit a

"fee petition" showing the reasonableness of the fee according to the seven criteria detailed at 20 C.F.R. § 404.1725(a) (2018). The Agency officer authorizing the fee then evaluates the information provided in the "fee petition" and sets a reasonable fee to reflect the value of the legal services provided. A fee may be authorized even if the claimant received no past-due benefits as a result of the attorney's efforts. *See* 20 C.F.R. § 404.1725(b) (2018). Additionally, *HALLEX*, § I-1-2-57, provides that "there is not a maximum fee amount that can be requested or authorized under the fee petition process" other than reasonableness and contractual limitations. *HALLEX*, § I-1-2-57; *see also Gisbrecht*, 535 U.S. at 794-95 (discussing generally § 406(a) fees and citing *HALLEX*). A "fee petition" fee can be in any amount, including 25%, 50%, and 100% of past-due benefits, or even when the claimant receives no past-due benefits. *E.g.*, *Buchanan v. Apfel*, 249 F.3d 485, 492 (6th Cir. 2001). Because there is not a limit on the amount of fees that may be awarded under § 406(a), there is not a limit on the sum of § 406(a) and § 406(b) fees in the aggregate.

The "fee agreement" process is the second method by which an attorney may obtain a § 406(a) fee for representing a claimant before the Agency. *See* 42 U.S.C. § 406(a)(2). Under this process, if the attorney and the claimant enter into a written fee agreement and submit the fee agreement to the Agency before the Agency issues a determination, and if the determination is favorable to the claimant, the Agency will approve that agreement at the time of the favorable determination,

provided the specified fee does not exceed the statutory limit. *See* 42 U.S.C. § 406(a)(2)(A). The statutory limit for a "fee agreement" fee is the lesser of 25% of past-due benefits *or* a specific amount, whichever is less. *See* 42 U.S.C. § 406(a)(2)(A). The current maximum "fee agreement" amount is $6,000. 74 Fed. Reg. 6,080 (Feb. 4, 2009). (Most attorneys use the "fee agreement" process at least for representation of a claimant through the claimant's first hearing before an administrative law judge.)

The "fee agreement" process for a § 406(a)(2) fee does not limit the amount that a court may authorize under § 406(b). *See* 42 U.S.C. § 406(a)(2). That process does not contain a cumulative cap on a § 406(b) fee to 25% of past-due benefits, i.e., a cap on the sum of any § 406(a) fee and any § 406(b) fee.

Such a cumulative cap would also be illogical. It is quite common for a claimant to have different attorneys at the administrative and court levels. Consider a case in which Attorney A contracted to represent a claimant during the administrative proceedings for a "fee agreement" fee and Attorney B contracted to represent that same claimant in court for a § 406(b) fee of 25% of past-due benefits. Assume that before Attorney B filed a motion with the court for a § 406(b) fee, the Agency determined that Attorney A should receive the full withheld 25% of the claimant's past-due benefits under the "fee agreement" process for his or her work before the Agency. *See* 42 U.S.C. § 406(a)(2). If there were a cumulative cap on a § 406(b) fee of 25% of past-due benefits of the sum of any § 406(a) fee and any

§ 406(b) fee, then a court could not award Attorney B *any* § 406(b) fee from the claimant's past-due benefits for Attorney B's successful work on the claimant's behalf in court. The full withheld 25% of the claimant's past-due benefits would have been authorized as a § 406(a)(2) fee for Attorney A. To the contrary, the Agency's determination of Attorney A's "fee agreement" fee under § 406(a)(2) for work before the Agency does not make more or less reasonable Attorney B's request that a court authorize a § 406(b) fee for his or her work performed in court.

The same rationale also applies if the same attorney represents the claimant during both the administrative proceedings and on judicial review. The Agency's determination of a reasonable § 406(b) fee for the attorney's work before the Agency has no logical connection to a reasonable § 406(b) fee for the attorney's work on judicial review.

In sum, the Court should hold that the Social Security Act does not include a cumulative cap on a § 406(b) fee to 25% of past-due benefits, including any § 406(a) fee and any § 406(b) fee.

II. In the Absence of a Statutory Cumulative Cap, a Court Has No Discretion to Impose a Cumulative Cap on a 42 U.S.C. § 406(b) Fee, i.e., the Sum of Any § 406(a) and Any § 406(b) Fees.

Respondent correctly acknowledges the Social Security Act does not include a cumulative cap on a

reasonable fee under 42 U.S.C. § 406(b) to 25% of past-due benefits, i.e., the sum of any § 406(b) fee and any fee under 42 U.S.C. § 406(a). Resp't Br. 14-22. Respondent incorrectly argues that a court may impose such a cumulative cap as a matter of discretion. *Id.* 24-26. According to Respondent, when determining a reasonable § 406(b) fee for an attorney's work on judicial review, a court has the discretion to take into account any fee that the Agency has authorized or might authorize to that attorney (or another attorney) for that attorney's work (or another attorney's work) before the Agency. Respondent is incorrect.[7]

Respondent maintains that the Agency has the discretion to impose a cumulative cap on a reasonable "fee petition" fee under 42 U.S.C. § 406(a) or even a "fee agreement" fee to 25% of past-due benefits, i.e., the sum of any § 406(a) fee and any § 406(b) fee, so a district court has similar discretion to impose a cumulative cap on a reasonable fee under § 406(b) fee. Resp't Br. 24-26. Respondent cites no authority that, as a discretionary matter, the Agency imposes a cumulative cap on a § 406(a) fee of 25% of past-due benefits, including any § 406(a) fee and any § 406(b) fee. Indeed, the Respondent concedes that a § 406(a) fee may be in any amount and that neither § 406(a) nor § 406(b) includes a cumulative cap. Resp't Br. 15-18. Cf. *Buchanan*, 249 F.3d at 492 (holding that the

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[7] As Amicus explains below, attorneys and claimants may agree that any § 406(b) fee should be capped at the sum of any § 406(a) fee and any § 406(b) fee. When an attorney and a claimant agree to a cumulative cap, a court enforces the agreement.

Commissioner is not allowed to cap a "fee petition" fee at 25% of past-due benefits "because such a cap cannot be reconciled with the full consideration of the factors specified in 20 C.F.R. §§ 404.1725(b) and 416.1525(b)").

Contrary to Respondent, with exceptions not relevant here, a court has no jurisdiction to determine the reasonableness of a § 406(a) fee.[8] *See Buchanan*, 249 F.3d at 492. Because the Agency has sole jurisdiction to determine the reasonableness of a § 406(a) fee, a court has no jurisdiction to determine a § 406(b) fee based on the value of an attorney's work before the Agency. Under *Gisbrecht*, a "reasonable" § 406(b) fee is not determined, even in part, by considering the amount the Agency authorized or might authorize

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[8] There is a prudential exception to the rule that the amount of a § 406(b) fee is legally unrelated to the amount of a § 406(a) fee. When a court enters judgment for a claimant after making a substantive ruling on the correctness of the Agency's decision, it does so pursuant to the fourth sentence of 42 U.S.C. § 405(g). *See Melkonyan v. Sullivan*, 501 U.S. 89, 97-99 (1991). The judgment terminates the civil action. *See Shalala v. Schaefer*, 509 U.S. 292, 296-303 (1993). By contrast, when a court remands a case to the Agency under the sixth sentence of § 405(g), the civil action is not terminated and the remand proceedings before the Agency are part of the civil action itself. *See Schaefer*, 509 U.S. at 299-300 (*citing Melkonyan*, 501 U.S. at 97; *Sullivan v. Hudson*, 490 U.S. 877, 880-81, 892 (1989)). The amount of a § 406(a) fee for proceedings before the Agency on sentence-six remand is likely relevant to the reasonableness of an attorney's request for a § 406(b) fee from a court to the extent that the § 406(a) fee and § 406(b) fee are for the same work before the Agency. Petitioner's case involved sentence four, not sentence six, of § 405(g). *See Wood v. Comm'r of Soc. Sec.*, 861 F.3d 1197, 1201 (11th Cir. 2017).

under § 406(a). *See Gisbrecht*, 535 U.S. at 799-809. In *Gisbrecht*, this Court held that when a court determines the amount of a § 406(b) fee, a court

> may require the claimant's attorney to submit, not as a basis for satellite litigation, but as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases.

Gisbrecht, 535 U.S. at 808. The "record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases" refer to the attorney's time record for work *in court* and non-contingent billing rate *for litigation*. If at issue for a § 406(b) fee were the hours expended at the administrative level, a court could or even would be drawn into satellite litigation over the time spent during administrative proceedings. But a court has no jurisdiction over such proceedings (except when a case is remanded to the Agency under sentence six of 42 U.S.C. § 405(g)). *See supra* n.8.

III. In Circuits *Without* a Cumulative Cap, the Prevailing Market Rate Includes a Cumulative Cap Either By Contract or in Practice.

The Court should decide this case considering the actual market for legal services. Even though the Social Security Act does not include a cumulative cap on a 42 U.S.C. § 406(b) fee to 25% of past-due benefits, i.e.,

a cap including any § 406(a) fee and any § 406(b) fee, the prevailing market rate for representation of a claimant in court includes such a cumulative cap either by contract or in practice.

There are Circuits with a cumulative cap on a § 406(b) fee of 25% of past-due benefits, i.e., including any § 406(a) fee and any § 406(b) fee. *See Wood*, 861 F.3d at 1204-05; *Morris v. Social Sec. Admin.*, 689 F.2d 495, 496-98 (4th Cir. 1982); *Dawson v. Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970). There are Circuits without such a cumulative cap. *See Clark v. Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008); *Wrenn ex rel. Wrenn v. Astrue*, 525 F.3d 931, 937 (10th Cir. 2008); *Horenstein v. Sec'y of Health and Human Servs.*, 35 F.3d 261, 262 (6th Cir. 1994) (en banc). By contract or in practice, the prevailing market rate for representing a claimant in court is the same in both kinds of Circuits. An attorney in a Circuit without a cumulative cap ordinarily requests that a court authorize a § 406(b) fee that reflects a cumulative cap. *E.g.*, *Edkins v. Comm'r of Soc. Sec.*, No. 1:15-cv-01322-PJG, 2018 WL 3207600, at *2 (W.D. Mich. June 29, 2018) (plaintiff's attorney sought a § 406(b) fee consistent with a cumulative cap); *De Gowin v. Berryhill*, No. 2:14-cv-02463-KJM-DB, 2018 WL 734459, at *1 n.3 (E.D. Cal. Feb. 6, 2018) (Report and Recommendation) (same); *Upton v. Colvin*, No. 6:12-cv-00168-JHP-SPS, 2016 WL 8465594, at *2 (E.D. Okla. June 1, 2016) (same). Even if the attorney requests that a court authorize a § 406(b) fee exceeding a cumulative cap and even if the court authorizes that fee, the attorney ordinarily will never receive from the

claimant's past-due benefits aggregate § 406(a) and § 406(b) fees exceeding 25% of past-due benefits.

In a Circuit without a cumulative cap, the contract between an attorney and a claimant for representation in court may include a cumulative cap. An attorney may attract a claimant by proposing to represent him or her in court for a § 406(b) fee of 25% of past-due benefits with a cumulative cap, instead of without a cumulative cap. The clear majority of claimants who seek representation in federal court were previously represented at the administrative level. At the administrative level, the prevailing market rate for representation is a § 406(a) fee of no more than 25% of past-due benefits using the "fee agreement" process or the "fee petition" process. *See* 42 U.S.C. § 406(a). It is obviously easier for an attorney to contract with a claimant to retain him or her for a fee that includes a cumulative cap than for a fee that does not. In addition, many attorneys contract with claimants at the administrative level, i.e., before any civil action is necessary to obtain benefits, to provide representation at both the administrative and court levels for a fee including a cumulative cap.

In a Circuit without a cumulative cap, the contract between an attorney and a claimant for representation in court sometimes does not include a cumulative cap. Nonetheless, as a practical matter, the attorney will ordinarily receive at most a § 406(b) fee consistent with a cumulative cap. This is due to (1) the statutory 25% cap on past-due benefits that the Agency withholds for both § 406(a) and § 406(b) fees for direct payment to an

attorney; (2) the limited means of the claimants; and (3) the difficulty of obtaining a fee from a claimant that is more than 25% of past-due benefits.

A. The Agency Withholds at Most 25% of Past-Due Benefits to Pay Any § 406(a) Fee *and* Any § 406(b) Fee; There is a Single Fund of 25% of Past-Due Benefits From Which the Agency Pays All Attorneys Directly.

When a claimant is found entitled to benefits, the Agency withholds 25% of past-due benefits for payment of a fee(s) directly to the attorney(s) from the withheld benefits. 42 U.S.C. § 406(a)(4).[9] There is thus a single fund of 25% of past-due benefits from which the Agency pays all attorneys directly any § 406(a) and/or any § 406(b) fee. After the Agency authorizes a § 406(a) fee or after a federal court awards a § 406(b) fee, the Agency pays the fee directly to the attorney from the withheld 25% of past-due benefits.[10] The

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[9] *See also POMS*, GN § 03920.017(B)(1) ("A direct payment is an authorized fee paid directly to an eligible appointed representative for services rendered at the administrative or federal court level. SSA makes this payment by withholding up to 25% of a claimant's past-due benefits."); *id.*, GN § 03920.017(D)(5) ("SSA withholds a maximum of 25 percent of past-due benefits for direct payment of fees, whether authorized by SSA, a court, or both.").

[10] An attorney pays an "assessment" for direct payment. *See* 42 U.S.C. § 406(d)(1) ("Whenever a fee for services is required to be certified for payment to an attorney from a claimant's past-due benefits pursuant to subsection (a)(4) or (b)(1), the Commissioner shall impose on the attorney an assessment").

Agency does not pay directly to an attorney a § 406(a) fee greater than 25% of past-due benefits; a § 406(b) fee greater than 25% of past-due benefits; or combined § 406(a) and § 406(b) fees greater than 25% of past-due benefits. The prevailing market rate in Circuits without a cumulative cap corresponds to 25% of past-due benefits that the Agency withholds for direct payment to an attorney.

B. 42 U.S.C. § 407(a) Prevents an Attorney From Using Legal Process to Obtain From a Claimant Him- or Herself an Attorney Fee From the Claimant's Social Security Benefits.

The Social Security Act prevents a claimant's attorney from using legal process to obtain from the claimant him- or herself an authorized attorney fee (under either § 406(a) or § 406(b)) from the claimant's benefits, including past-due benefits:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). Because the Agency withholds at most 25% of past-due benefits, *see* 42 U.S.C. § 406(a)(4), the Agency pays an attorney directly a § 406(a) fee and/or a § 406(b) fee only to the extent that 25%

of past-due benefits have not been depleted by the prior direct payment of an authorized fee. *See POMS*, GN § 03920.017(D)(5). If there is an authorized fee that exceeds 25% of past-due benefits, the attorney must collect that fee from the claimant him- or herself. *See Wrenn ex rel. Wrenn*, 525 F.3d at 933 ("If the amount withheld by the Commissioner is insufficient to satisfy the amount of fees determined reasonable by the court, the attorney must look to the claimant, not the past-due benefits, to recover the difference.").

For example, if the Agency authorized a § 406(a) fee of 20% of past-due benefits; if the Agency paid that § 406(a) fee directly to the attorney; and if a court later authorized a § 406(b) fee of 25% of past-due benefits, the Agency would pay the attorney directly a § 406(b) fee of 5% of past-due benefits, i.e., the amount remaining from 25% of past-due benefits withheld. The attorney would have to collect from the claimant him- or herself the 20% of past-due benefits that the Agency did not pay the attorney directly. Importantly, the clear majority of claimants who have been found entitled to disability benefits have limited economic resources. After all, they are unable to work. Many disabled claimants also have significant debts, including for medical treatment. Thus, as a matter of fact, a typical claimant would be unable to pay his or her attorney the 20% of past-due benefits owed to the attorney. Further, even if the attorney desired to collect the 20% of past-due benefits owed to him or her as a § 406(b) fee, the attorney cannot use a legal process to obtain the 20% of past-due benefits owed to him or her out of the past-due

benefits (to the extent that the claimant's money is identifiable as Social Security benefits). *See* 42 U.S.C. § 407(a).

In sum, if the Court reverses the judgment below and holds that the Social Security Act does not include a cumulative cap on a § 406(b) fee, the impact of the Court's holding will be limited, given the actual legal marketplace.

IV. The Savings Provision States That an Attorney Shall Refund to a Claimant the Smaller of a 42 U.S.C. § 406(b) Fee and an EAJA Fee That the Attorney Receives; Petitioner Obtained a Net § 406(b) Fee to Avoid (1) Refunding to Ms. Wood the Smaller EAJA Fee He Received and (2) Collecting From Ms. Wood the Portion of the § 406(b) Fee That the Agency Did Not Pay Him Directly From Ms. Wood's Past-Due Benefits.

Petitioner's request for a 42 U.S.C. § 406(b) fee exceeding the Eleventh Circuit's cumulative cap concerns only Ms. Wood. Pet'r Br. II. Amicus describes how Petitioner used an Eleventh Circuit case that allows a court to authorize the Agency to pay an attorney directly from the claimant's past-due benefits only a portion of a § 406(b) fee, namely, the portion of the § 406(b) fee remaining after a smaller EAJA fee is deducted. *See Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268, 1272-74 (11th Cir. 2010). Petitioner used *Jackson*'s allowance of a net § 406(b) fee to avoid (1) refunding to Ms. Wood the smaller EAJA fee consistent with the

§ 406(b)'s Savings Provision and (2) collecting from Ms. Wood the portion of the § 406(b) fee that the Agency did not pay him directly from Ms. Wood's past-due benefits.

A. The Savings Provision Includes a Refund Provision.

A court shall award attorney fees and expenses under the EAJA to a prevailing party in a civil action under 42 U.S.C. § 405(g) if the prevailing party satisfies the requirements of the EAJA. *See* 28 U.S.C. § 2412(d); *Astrue v. Ratliff*, 560 U.S. 586, 588-89 (2010); *Schaefer*, 509 U.S. at 296-97. An EAJA award is paid from an agency's general fund. Under the Treasury Offset Program, the United States may seize an EAJA fee in whole or in part to pay a prevailing party's debt. *See Ratliff*, 560 U.S. at 588-89. The Savings Provision for 42 U.S.C. § 406(b) allows an attorney to receive any (post-offset) EAJA award notwithstanding § 406(b), so long as the attorney refunds to the claimant the smaller of the § 406(b) fee and the EAJA fee that the attorney receives:

> Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title

> 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.

Pub. L. No. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186; *see also Ratliff*, 560 U.S. at 595-96 (describing Savings Provision); *Gisbrecht*, 535 U.S. at 796 (same). The purpose of the Savings Provision is to benefit the claimant, not the attorney. *See Gisbrecht*, 535 U.S. at 796.

B. The Savings Provision Does Not Apply to a 42 U.S.C. § 406(a) Fee for Work Before the Agency in a Sentence-Four Case.

The Savings Provision applies to a court-authorized fee under 42 U.S.C. § 406(b) and not to an Agency-authorized fee under 42 U.S.C. § 406(a). *See* Pub. L. No. 99-80, § 3. The Savings Provision applies when there are two fees for the "same work." *Id.* With the exception of administrative proceedings on court remand under sentence six of 42 U.S.C. § 405(g), *see Melkonyan*, 501 U.S. at 96-97; *supra* n.8, work representing a claimant during administrative proceedings is not the "same work" as representing the claimant in court. Thus, if an attorney does not receive a § 406(b) fee, but receives a § 406(a) fee for work before the Agency and a separate EAJA fee for work in court, the attorney keeps the entire § 406(a) fee and the entire EAJA fee. *See Rice v. Astrue*, 609 F.3d 831, 838 (5th Cir. 2010). The claimant him- or herself pays only the § 406(a) fee.

C. In Most Civil Actions in Which a Claimant Obtains Judicial Relief, a Court Rules on an Application for EAJA Fees Before a Motion for a 42 U.S.C. § 406(b) Fee is Filed.

Courts seldom hold that a claimant is disabled and entitled to benefits, making further administrative proceedings unnecessary. *See* 42 U.S.C. § 405(g) (sentence four) ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."). In Fiscal Year 2017, courts held that claimants were entitled to benefits in 2% of civil actions and remanded for further administrative proceedings 48% of civil actions.[11] Because a judgment under sentence four reversing the Commissioner's final decision with a remand for a rehearing makes a claimant a prevailing party, a prevailing party may apply for EAJA fees after a sentence-four remand. *See Schaefer*, 509 U.S. at 296-97 & n.2. When a court reverses the Commissioner's final decision with a remand for a rehearing, i.e., for further administrative proceedings, the claimant has not yet been found entitled to benefits and thus there are no past-due benefits from which a § 406(b) fee could be authorized. In Fiscal Year 2017, administrative law judges allowed 47% of claims, including those on court

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[11] Soc. Sec. Admin., *FY 2019 Congressional Justification*, at 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

remand.[12] If a claimant is found disabled on remand, the claimant's attorney may ask the court to award a § 406(b) fee from the claimant's past-due benefits. *See Jackson v. Astrue*, 705 F.3d 527 (5th Cir. 2013).

D. Petitioner Used Eleventh Circuit Net-Fee Law to Avoid the Savings Provision's Refund Provision.

Amicus describes how Petitioner used Eleventh Circuit net-fee law to avoid (1) refunding to Ms. Wood the smaller of the court-awarded EAJA fee and § 406(b) fee under the Savings Provision and (2) collecting from Ms. Wood herself a fee in excess of the 25% of past-due benefits withheld.

In June 2012, Ms. Wood hired Petitioner to represent her in court for a contingent fee of 25% of past-due benefits. Joint App. 8-10. At that time, Eleventh Circuit precedent included a cumulative cap.[13] *See*

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[12] *FY 2019 Congressional Justification*, at 206.

[13] When Ms. Wood hired Petitioner in June 2012, Petitioner was aware that Eleventh Circuit precedent imposed a cumulative cap. *E.g., Jackson v. Comm'r of Soc. Sec.*, No. 6:07-cv-1432-Orl-KRS, 2010 WL 11595279, at *3 (M.D. Fla. Nov. 18, 2010) (district court reminding Petitioner that controlling Circuit law included a cumulative cap), *rev'd on other grounds Jackson v. Comm'r of Soc. Sec.*, 601 F.3d 1268 (11th Cir. 2010). Petitioner's and Ms. Wood's contract did not mention the cumulative cap. Joint App. 8-10. However, the contract may be construed as including that cap. *See Arabia v. Siedlecki*, 789 So.2d 380, 383 (Fla. 4th DCA 2001) ("An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney."). The contract

Wood, 861 F.3d at 1204-05 (*citing Dawson*, 425 F.2d 1192). In September 2013, the district court reversed Ms. Wood's case with a remand for a rehearing pursuant to sentence four 42 U.S.C. § 405(g). In November 2013, the district court awarded an EAJA fee of $4,107.27. Petitioner eventually received that amount. On remand, the Agency awarded Ms. Wood past-due benefits and withheld for payment of an attorney fee(s) $8,595.75. The Agency also authorized a § 406(a) fee of $2,865, which Petitioner received. In March 2016, Petitioner asked the district court to authorize a § 406(b) fee of $8,595.75, i.e., the entire amount withheld from Ms. Wood's past-due benefits, and order payment to him of a net fee of $4,488.48, i.e., the 25% of past-due benefits of $8,595.75 minus the $4,107.27 EAJA fee Petitioner received earlier. *See Jackson*, 601 F.3d at 1272-74 (allowing a court to order the Agency to pay an attorney not the entire § 406(b) fee but the § 406(b) fee reduced by the smaller EAJA fee that the attorney previously received). This would relieve Petitioner of his Savings Provision duty to refund to Ms. Wood the smaller EAJA fee.[14] The district court applied the Eleventh Circuit's cumulative cap and found that $5,730.79 remained from the withheld 25% of past-due benefits ($8,595.75 (25% of past-due benefits) – $2,865.00

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does not provide evidence Ms. Wood understood that Petitioner would seek a larger fee than Circuit law allowed.

[14] In Petitioner's contract with Ms. Wood, Petitioner did not promise to refund the smaller of the § 406(b) fee or the EAJA fee he received, but to use an EAJA fee he received "to reduce the amount of attorney fees that would otherwise be due from claimant's past-due benefits." Joint App. 9.

(§ 406(a) fee Petitioner received)). The district court then applied the Eleventh Circuit's net-fee method from *Jackson* and authorized a § 406(b) fee of $1,623.48 ($5,730.79 (amount of 25% of past-due benefits remaining after subtraction of $2,865.00 § 406(a) fee) – $4,107.27 (EAJA fee Petitioner received)).

Without a cumulative cap *and* without the Eleventh Circuit's net § 406(b) fee method in *Jackson* and assuming that Petitioner is authorized a § 406(b) fee of 25% of Ms. Wood's past-due benefits, Petitioner would need to refund to Ms. Wood the smaller EAJA fee and collect from Ms. Wood herself a portion of the § 406(b) fee. Amicus provides a step-by-step description of that scenario. First, the district court awarded and Petitioner received an EAJA fee of $4,107.27. Second, the Agency awarded Ms. Wood past-due benefits; withheld for payment of an attorney fee(s) $8,595.75; and authorized a § 406(a) fee of $2,865.00. Third, Petitioner asked the district court to authorize a § 406(b) fee of $8,595.75, i.e., the entire amount withheld from Ms. Wood's past-due benefits. Fourth, the district court ruled that $8,595.75 is a reasonable § 406(b) fee. Fifth, the Agency would pay Petitioner directly not $8,595.75 as a § 406(b) fee, but $5,730.75. Because the Agency withholds only 25% of past-due benefits and because the Agency already paid Petitioner $2,865.00 as a § 406(a) fee, only $5,730.75 remains to pay Petitioner a § 406(b) fee directly from Ms. Wood's past-due benefits. Sixth, because Petitioner received a § 406(b) fee of $5,730.75 and an EAJA fee of $4,107.27, Petitioner must refund to Ms. Wood the smaller fee, i.e., $4,107.27. Lastly,

Petitioner would need to use self-help to collect from Ms. Wood the $2,865.00 remaining of the $8,595.75 § 406(b) fee authorized.

In theory, Petitioner could receive the same total fees if the Savings Provision's refund provision were followed that he would receive if he received a net § 406(b) fee under *Jackson*. But following the Savings Provision's refund provision would require Petitioner to spend resources (1) administering that provision and (2) collecting from Ms. Wood a portion of the § 406(b) fee. Further, as shown above, there is a risk that an attorney will be unable to collect from a claimant him- or herself an authorized § 406(a) fee or § 406(b) fee that the Agency did not pay the attorney directly. Consequently, an attorney may decide not to attempt to collect from the claimant the remaining authorized fee.

CONCLUSION

The Court should decide the question presented taking into account the language and structure of 42 U.S.C. § 406(a) and (b). With respect to Respondent's position that a court has discretion to impose a cumulative cap of 25% of past-due benefits when determining a reasonable § 406(b) fee, the Court should recognize that a court has no jurisdiction over the determination of a reasonable fee under § 406(a). Further, the Court may also consider the actual marketplace for legal services for Social Security claimants. The

prevailing market rate in that marketplace includes a cumulative cap even though not required by the Social Security Act.

Respectfully submitted,

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